Supreme Court, U. S.
FILED
MAY 16 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1818

BEACON NATIONAL INSURANCE COMPANY

AND

FIRST PREFERRED INSURANCE COMPANY,

Petitioners

V.

TEXAS STATE BOARD OF INSURANCE

and

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,

Respondents

Petition for Writ of Certiorari
to the Court of Civil Appeals
Third Supreme Judicial District
of Texas at Austin, Texas

JOE E. SHADDOCK
318 City National Building
Wichita Falls, Texas 76301
Attorney for Petitioners

INDEX

Page

Opinions below 2
Jurisdiction 2
Question presented 2
Constitutional and Statutory Provisions Involved 3
Statement 3
Reasons Relied on for the Allowance of the Writ 4
Conclusion 11
Appendix 13

Citations

Cases:

Abie State Bank V. Bryan, 282 US 765; 51 S. Ct. 252; 75 L. Ed 690 8

Block V. Hirsch, 256 US 135; 65 L. Ed 865; 41 S. Ct. 458 10

Codispotti V. Pennsylvania, 418 US 506; 41 L. Ed 2d 912; 94 S. Ct. 2687 9

Key Western Life Insurance Company V. State Board of Insurance, 350 S.W. 2d 839 (TX. Sup. Ct.) 10

Lawrence V. State Tax Commission, 286 US 276; 52 S. Ct. 556; 76 L. Ed 1102 8

New York Ex. Rel. New York & Q Gas Company V. McCall, 245 US 345; 38 S. Ct. 122; 62 L. Ed 337 8

State Board of Insurance V. Professional & Businessmen's Insurance Company, 359 S.W. 2d 312 (writ refused, no reversible error) 10

USLIFE Life Insurance Company of Texas V. State Board of Insurance, 527 S.W. 2d 204(writ refused, no reversible error) 10

Constitutional, Statutory and Regulatory Provisions:

Fifth, Seventh, and Fourteenth Amendment to the United States Constitution

Article 21.49, Vernon's Annotated Texas Statutes

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1979

No._____

BEACON NATIONAL INSURANCE COMPANY

AND

FIRST PREFERRED INSURANCE COMPANY,

Petitioners

V.

TEXAS STATE BOARD OF INSURANCE

and

TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION,

Respondents

Petition for Writ of Certiorari
to the Court of Civil Appeals
Third Supreme Judicial District
of Texas at Austin, Texas

The Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered in the above case on May 30, 1979.

OPINION BELOW

The opinion of the District Court of Travis County, 53rd Judicial District, No. 260,154-A, is not reported but is contained in the Appendix attached hereto. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin is reported at 584 S.W. 2d 616.

JURISDICTION

The Judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas was made and entered on May 30, 1979 and copies of the Judgment and opinion are appended to this petition in the Appendix. After rendition of such Judgment and Opinion, the said Court of Civil Appeals denied Petitioners' Motion for Rehearing on June 20, 1979. The Texas Supreme Court denied Petitioners' Application for Writ of Error on December 19, 1979 and Petitioners' Motion for Rehearing on their Application for Writ of Error on February 20, 1980. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED

(1) Whether the State of Texas has denied Petitioners two inherent rights of the Fourteenth Amendment to the United States Constitution -- due process and equal protection -- by requiring Petitioners to submit to the Plan of Operation of the Texas Catastrophe Property Insurance Association while empowering private corporations composing the Board of such Association to structure the Plan so that the Board members have practically no liability while the small members, such as Petitioners, have more liability than their capital assets.

(2) Whether the State of Texas, through her legislature and courts may deny Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment and their constitutional right to a trial by jury in a dispute over management of an Association by (1) requiring Petitioners to be sub-

ject to an Association governed by the largest insurance companies in the country and (2) requiring Petitioners disputes be first brought before a state agency (Texas State Board of Insurance) and (3) then holding the substantial evidence rule applies to the hearing before the Board.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provisions are the Fifth, Seventh and Fourteenth Amendments to the United States Constitution. The principal statutory provision is Article 21.49, Vernon's Annotated Texas Statutes which is set out in the attached Appendix. In addition, the pertinent provision of the Plan of Operation of the Texas Catastrophe Property Insurance Association is set out in the attached Appendix.

STATEMENT

Petitioners are insurance companies doing business in the State of Texas. All insurance companies in the State of Texas writing windstorm insurance are required by Article 21.49, **Vernon's Annotated Texas Statutes,** to be members of the Texas Catastrophe Property Insurance Association (hereinafter called "Cat Pool"). Texas and other coastal states have formed such insurance pools to provide windstorm insurance coverage for catastrophes such as hurricanes which periodically devastate large sections of the coastal United States. The Texas Plan delegates the authority of the State to the Respondent Cat Pool which is governed by a Board of Directors composed of the largest insurance companies in the nation. The Board of Directors adopted a Plan of Operation which permits the Board members to avoid virtually all liability under the Cat Pool's insurance policies and assigned smaller companies such as these Petitioners far more potential liability than Petitioners' capital assets. The Cat Pool does not maintain any reserves and disburses to the member companies the annual premiums collected less any accrued losses for the particular plan year. The Cat Pool relies upon the capital assets of its member companies to pay losses in excess of the one year's premium held in reserve.

Accordingly, Petitioners and other companies similarly situated face confiscation of their capital assets upon a substantial hurricane loss to the Texas coast. Further, the insureds holding Cat Pool policies will not be able to be paid for their losses since the Cat Pool has no other reserves available with which to pay them. The Board of Directors on the other hand will emerge from such a catastrophe unscathed.

Texas' Article 21.49 requires Petitioners to be members of the Cat Pool and to submit any dispute first to the Texas State Board of Insurance and then to the Texas State District Court at Austin. Petitioners' request for a jury in the District Court was denied and the case was tried under the substantial evidence rule rather than the preponderance of evidence rule. The Texas Court of Civil Appeals held that the case was properly tried under the substantial evidence rule and that there was substantial evidence that the Plan of Operation was being operated fairly and in a non-discriminatory manner.

Petitioners raised the constitutional questions in their Petition filed in the State District Court at Austin and in their briefs filed in the Texas Court of Civil Appeals and in the Texas Supreme Court. See attached Appendix for Petitioners' petition filed in this cause.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case presents the issue of the right of the States under the 5th, 7th, and 14th Amendments to delegate to private industry the power of the State with no more guidance than that the power be exercised "fairly and non-discriminatorily". Virtually all coastal states have enacted legislation for the laudable purpose of providing insurance coverage to its citizens in coastal areas unable to obtain windstorm coverage. But if the plans can be structured to exempt from liability the class of large insurers governing

the plan and to place an insupportable burden of liability on that class of small insurers unable to sustain it then the net result is that the insureds will not be able to collect on their respective policies.

The problem has become worse as the population has grown and spread more and more areas close to the coast which have been developed for residential, commercial and entertainment purposes. As a consequence, hurricanes now extract a heavy toll in property damage and loss of life. Insurance companies faced with the probability of catastrophic losses have pulled out of high risk areas and refused to write policies in them. In order to provide windstorm protection to their people the states have enacted statutes attempting to provide such coverage through a state-required insurance plan in which all insurance companies doing business in the state are required to participate. If the insurance company participation were simply pro rata based on statewide writings of premium there probably would be no problem. However, the states have endeavored to encourage insurance companies to write in the affected areas voluntarily and have generally included some sort of credit provision so that companies writing voluntarily in the area may exempt themselves to that extent from the Plan. Where the management of the Plan is entrusted to the largest members of the insurance industry as in the present case the result promises bankruptcy for many members of the insurance industry and havoc for the insureds.

The Texas Plan is managed by the large insurers sitting as companies on the managing Board of Directors. The credit provisions in the Plan of Operation appear fair on their face and provide a dollar for dollar credit for insurance premiums voluntarily written by a company in the catastrophe area. In the real world however, insurance policies are subject to acceptance by mortgage lenders based upon company size not company quality. The standard rating is that contained in **Best's Key Rating Guide.** For instance, Petitioners have a rating of A/VII, the A classification meaning excellent quality and the Roman numeral indicating the financial size. The quality rating indicates the ability to pay claims while the

financial size merely indicates quantity of assets. It does not indicate the amount of assets above liabilities. Nevertheless, mortgage lenders accept or reject insurance policies based on the latter rating, that of financial size. Consequently, insurance companies with ratings of less than A/X are generally not acceptable by mortgage lenders. Since ours is a credit economy virtually all properties are subject to mortgages and the mortgage company rejections have effectively restricted Petitioners' efforts to avail themselves of the credit for voluntary writings.

Petitioners have made efforts to write voluntarily in the Catastrophe Areas but still receive Cat Pool participation of more than double their percentage of statewide writings (1.783% participation, .822% statewide premiums). Most of the large insurance companies do not write voluntarily in many parts of the catastrophe area while Petitioners write voluntarily in all areas. Further, Petitioner First Preferred Insurance Company offers a deviated (discounted) rate 20% less than the premium charged by other companies. Still the net effect is as stated, more than double Cat Pool participation than their statewide writings. Many smaller insurers face bankruptcy or liquidation because of their assignment of Cat Pool participation. Petitioners' portion of the projected loss exceeds their capital assets.

The Texas Coastal and Marine Council has estimated that another hurricane of the magnitude of Hurricane Carla in 1961 would, based on 1968 figures, amount to a wholesale construction cost of $849,000,000.00. When this figure is adjusted for retail and three years of inflation, the loss will approximate two billion dollars. The estimated loss to the Cat Pool would then be in the area of $500,000,000.00. The Cat Pool maintains no reserves and pays out the unexpended portion of collected premiums annually so as to maintain on hand only the current year's collected premiums for payment of such catastrophic losses.

The large insurers have structured the Plan so as to derive maximum benefit in the marketplace and avoid virtually all

Cat Pool liability exposure. This is illustrated by the following chart:

RATING	BOARD OF DIRECTORS	POOL PARTICIPATION	STATEWIDE PREMIUM WRITINGS
A+ XV	State Farm Insurance Company	-0-	6.353
A+ XIV	Republic Financial Services Group	-0-	3.998
A+ XV	Farmers Insurance Group	-0-	2.959
A+ XV	Continental Insurance Companies	-0-	4.955
A+ XV	U.S. Fire Insurance Company	-0-	1.835
A XII	Employers Mutual Casualty Company	-0-	.211
A+ XV	American General Fire & Casualty	1.534	3.152
A XV	Commercial Union Insurance Group	1.685	1.379
A+ IX	USAA	2.124	1.295
	Subtotal	5.343	26.137
	PAST OR RECENT BOARD OF DIRECTORS		
A XV	Aetna	-0-	5.16
A+ XV	Allstate	.212	3.42
A+ XV	Fireman's Fund	.004	2.84
A XIII	Hartford	.195	2.99
	Subtotal	.411	14.41
	Grand Totals	5.754	40.547

As the chart above shows, the present and recent members of the Board of Directors, and those with the greatest assets have strucured the Plan so that they escape liability exposure almost completely. Conversely, those companies with the bulk of the liability exposure do not have the capital assets with which to pay these losses. As a result, not only Cat Pool insureds along the coastal area but also other insureds of the affected companies will not be paid their losses.

It may be noted at this point that the resort to the Courts for relief from this oppression is a Sisyphean task. The exact percentages of Cat Pool participation change annually and

the Cat Pool can change the Plan of Operation any time a decision appears imminent. Since Petitioners filed their complaint in 1976, the exact participation figures have changed and in fact the Board has provided a minimum participation for all companies of 20% of their statewide writings and a maximum participation of 190%. Nevertheless, the basic effect is still the same in that the bulk of the Cat Pool liability exposure falls on those companies which do not have the capital assets to pay the losses. Petitioners' most recent participation has increased to 2.50%. In addition, the Texas legislature has adopted Section 19 of Article 21.49 to provide a tax credit for those companies which survive the assessment of Cat Pool losses. None of these acts will provide money with which to pay hurricane losses at the time the same are sustained.

Although the decision below was not based on federal grounds, this Court should inquire whether the decision rests upon a fair or substantial basis in order that Petitioners' constitutional guarantees may be appropriately enforced as this Honorable Court did in **Abie State Bank** v. **Bryan,** 282 US 765; 51 S. Ct. 252, 75 L. Ed 690; and in **Lawrence** v. **State Tax Commission,** 286 US 276; 52 S. Ct. 556; 76 L. Ed 1102. Further, as this Court stated in **New York Ex. Rel. New York & Q. Gas Company** v. **McCall,** 245 US 345; 38 S. Ct. 122; 62 L. Ed 337:

> "Although the Federal Supreme Court has no authority to substitute its judgment for that of an administrative body as to the wisdom or policy of an order complained of and will not analyze or balance the evidence which was before the Commission, it will enter upon such an examination of the record as may be necessary to determine whether there was such a want of hearing, or such arbitrary or capricious action on the part of the commission as to deny the invoked constitutional right to due process of law."

In the case at bar, the large insurance companies, using the power of the State of Texas, have placed many small insurance companies in the perilous position of being forced to

assume more in Cat Pool liability exposure than their capital assets and have so perverted the law as to effectively deny the insureds a right of recovery for their hurricane losses. Further, the large insurance companies stand to benefit by their arbitrary use of state power since the reduction of competition and anticipated increase of premiums to pay for catastrophic losses will result in windfall profits for the survivors.

2. The Supreme Court of the United States should expand the protection of the Fourteenth Amendment to include the rights granted under the Seventh Amendment. In this case there is hardly a doubt that a jury permitted to find facts under the preponderance of evidence rule would have found the Plan of Operation to be unfair and discriminatory in operation. It is inconceivable that a jury would permit a group of large insurance companies to use the power of the State to avoid payment of their fair share of liability for a devastating hurricane. Yet the Texas courts have held that the mere fact that disputes under Article 21.49 must first be taken to the Texas State Board of Insurance denies Petitioners the right to a trial by jury.

As this Honorable Court has held in **Codispotti** v. **Pennsylvania**, 418 US 506, 41 L. Ed 2d 912, 94 S. Ct. 2687:

> "The jury trial guarantee reflects 'a profound judgment about the way in which law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the government.' Duncan v. Louisiana, 391 US at 155, 20 L. Ed 2d 421 (footnote omitted). The Sixth Amendment represents a 'deep commitment of the nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement...' Id, at 156, 20 L. Ed 2d 491." (p. 921)

The reasons for applying the Fourteenth Amendment to include the jury trial guarantees of the Sixth Amendment are equally as strong for applying the same guarantee under the

Seventh Amendment. It is just as necessary to prevent oppresion by the govenment in a civil case such as the case at bar as in the contempt discussed in **Codispotti,** supra. It should be noted that a person accused of crime may be deprived of his life, liberty or property while a corporation faced with the loss of its entire capital assets is just as effectively being deprived of its life, liberty and property. It is just as necessary to provide for jury trial in the case at bar as a defense against arbitrary law enforcement as it was in the isolated Codispotti incident since hundreds of thousands of people are being effectively denied collectable insurance at the time when they will most need it.

It is one thing to delegate legislative authority to a state agency; it is another to delegate such authority to private industry. In the latter case no valid reason exists to deny the right of trial by jury.

Petitioners have no quarrel with this Court's holding in **Block** v. **Hirsch,** 256 US 135, 65 L. Ed 865, 41 S. Ct. 458, where this Court held jury trials would be incompatible with the whole concept of administrative adjudication. It is earnestly argued however that the operation of Respondent Cat Pool is nothing more than a corporate type association in the usual mold of management and members. It should be noted too that Article 21.49 creating such Association specifically envisioned trial de novo in the District Court by its provision that "the person aggrieved...may thereafter appeal to the District Court of Travis County, Texas and not elsewhere in accordance with Article 1.04 (f) of the Insurance Code of Texas." Article 1.04(f) has been held by Texas courts as requiring a trial de novo. See **Key Western Life Insurance Company** v. **State Board of Insurance,** 350 S.W. 2d 839 (Texas Sup. Ct.); **State Board of Insurance** v. **Professional and Businessmen's Insurance Company,** 359 S.W. 2d 312 (writ refused, no reversible error); and **USLIFE Life Insurance Company of Texas** v. **State Board of Insurance,** 527 S.W. 2d 204 (writ refused, no reversible error). Nevertheless, in the case at bar the Austin Court of Civil Appeals held by a tortured bit of reasoning that the agency action was legislative rather than adjudicatory. In fact the only agency

action in the case at bar was that of the State Board of Insurance sitting as a court of first resort as required by Article 21.49. It was the record made before the State Board of Insurance that the Court of Civil Appeals considered in finding "substantial" evidence to support the Texas State Board of Insurance ruling. Accordingly, there is, or should be, no question but what the case at bar does not involve administrative proceedings any more than do declaratory judgment actions, stockholder suits, or forcible entry suits.

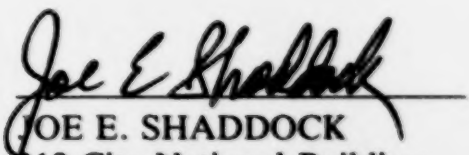
In short, the arguments for expanding the Fourteenth Amendment to include the jury trial guarantee are just as pressing and persuasive as in **Codispotti**, supra, but of wider scope.

There is probably no stronger argument in favor of extending the Fourteenth Amendment to include the Seventh Amendment than that the United States Supreme Court cannot, and should not rule on every case of arbitrary and oppressive governmental action. By requiring cases such as the one at bar to be submitted to a jury, the people themselves can correct the abuses and at an early stage.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,



JOE E. SHADDOCK
318 City National Building
Wichita Falls, Texas 76301

Counsel for Petitioners

PROOF OF SERVICE

I, Joe E. Shaddock, attorney for Beacon National Insurance Company and First Preferred Insurance Company, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of May, 1980, I served copies of the foregoing Petition for a Writ of Certiorari to the Court of Civil Appeals, Third Supreme Judicial District of Texas at Austin, Texas, on the parties thereto, as follows:

On the Defendants by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To Ms. Mary Joe Carroll, of the firm Clark, Thomas, Winters & Shapiro, P. O. Box 1148, Austin, Texas 78767, Attorney for Texas Catastrophe Property Insurance Association; and

To Mrs. Catherine Brown Fryer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Texas State Board of Insurance.

Joe E. Shaddock

JOE E. SHADDOCK

Attorney for Petitioners

318 City National Building
Wichita Falls, Texas 76301
Telephone: 817/723-4105

APPENDIX - 1

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED MAY 30, 1979

12,967 - **BEACON NATIONAL INSURANCE COMPANY, ET AL. V. TEXAS STATE BOARD OF INSURANCE, ET AL.**
APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY AFFIRMED - Opinion by Chief Justice Phillips

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment; IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby in all things affirmed. It is FURTHER ordered that appellants, Beacon National Insurance Company and First Preferred Insurance Company, as principal, and Fidelity and Deposit Company of Maryland, as surety on the appeal bond herein, pay all costs in this behalf expended and that this decision be certified below for observance.

APPENDIX - 2

**IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN**

NO. 12,967

**BEACON NATIONAL INSURANCE COMPANY,
ET AL.,**

APPELLANTS

VS.

**TEXAS STATE BOARD OF INSURANCE,
ET AL.,**

APPELLEES

**FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT NO. 260,154-A
HONORABLE HARLEY CLARK, JUDGE PRESIDING**

Appellants, Beacon National Insurance Company and First Preferred Insurance Company, contend that the Texas Catastrophe Property Insurance Association (commonly referred to as the Cat Pool) is not being operated fairly and in a non-discriminatory manner. Appellants have been unsuccessful before the Cat Pool Board of Directors and in appeals to the State Board of Insurance and district court of Travis County. Appellants have now perfected their appeal to this Court.

We affirm.

The Cat Pool was created by Texas Insurance Code Ann. art. 21.49 (Supp. 1978). Its membership consists "of all property insurers authorized to transact property insurance in this State, except those companies that are prevented by law from writing coverages available through the pool on a Statewide basis." *Id.* § 4(a). The purpose of the enactment is

to provide insurance for property owners in the "Catastrophe Area" of Texas where hurricane risk is great. The State Board of Insurance has determined that the catastrophe area is comprised of the first tier of counties along the Gulf coast.

Member insurance companies are assigned a percentage share of expenses, profits and losses of insurance written by the Cat Pool based upon the total amount of premiums written by the member in Texas. Members of the Cat Pool are "entitled to receive credit for similar insurance voluntarily written in the area designated by the Board (the Gulf coast counties) and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation." *Id.* § 5(c).

The plan of operation of the Cat Pool was required by the statute to be prepared by a temporary board of directors of the Pool, appointed by the State Board of Insurance. The permanent board of directors is elected in the manner set out in the plan of operation. Each one of five directors is chosen from one of five different insurance organizations. The remaining four directors are elected at large from the overall membership of the Cat Pool. It is important to note that the plan of operation of the Cat Pool was approved by the State Board of Insurance.

Appellants' complaint in this case is that the Cat Pool is being administered unfairly and discriminatorily. It is appellants' contention that this is shown by the fact that the very large member companies that have representatives on the board of directors have almost a zero percent participation in Cat Pool insurance writings. The reason these companies have such a low percentage share is because they avail themselves of the authorized credit for insurance voluntarily written in the catastrophe area. Appellants point to two actions that would remedy the alleged discriminatory operation of the Cat Pool, namely, reduction of the size of the catastrophe area or a reduction of the credit for voluntarily written insurance in the catastrophe area to something less than a dollar-for-dollar credit.

"Catastrophe Area" is defined to mean a city or county in which windstorm and hail insurance "is not reasonably available to a substantial number of owners of insurable property ..." Tex. Rev. Civ. Stat. Ann. art. 21.49 § 3(h) (Supp. 1978). This determination is made by the State Board of Insurance, not the Cat Pool or its board of directors. In addition, the designation of the catastrophe area may be revoked by the State Board of Insurance. The Cat Pool may also make a determination that "insurance is no longer reasonably unavailable" and it may then request the State Board to revoke the designation. *Id.* Appellants contend that the Cat Pool's failure to make such a request amounts to arbitrary and discriminatory conduct with respect to appellants. The only evidence offered by appellants to show that property insurance in any cities or counties within the catastrophe area is now readily available is the fact that Nueces and Jefferson Counties together account for only twenty percent of the writings of the Pool.

The basis for appellants' complaint is, apparently, that the larger insurance companies, which are represented on the board of directors of the Cat Pool, are able to write many more voluntary insurance policies in the catastrophe area than are appellants. These larger insurers are thereby able to select better property risks and at the same time reduce participation in the Cat Pool with its poorer risk policies. Appellants' argument is that the Cat Pool board of directors is acting unfairly by not taking steps to offset this advantage of the larger insurance companies.

It is obvious that the advantage results from the statutorily authorized credit for voluntary insurance. Appellants insist that they are precluded from benefiting from the credit because mortgage lenders will not accept insurance written by appellants. This is so, they claim, because their financial rating is not as high as the other larger insurers. We do not believe this of itself is sufficient to prove that the Cat Pool is being operated unfairly. The large insurers' representatives on the Cat Pool board of directors are not obligated to make changes in the Cat Pool's operation simply because they are able to benefit from the credit provision of the statute.

Furthermore, appellants' witnesses testified that mortgage lenders in the catastrophe area do in fact accept insurance written by appellants. An independent insurance agent in Galveston County could think of only one mortgagee who refused to approve appellants. A Beaumont agent testified that she did a substantial volume of business for appellants. A director of Beacon National stated that mortgage lenders refuse to use appellants' policies but that the problem is statewide and not limited to the catastrophe area. Finally, the executive vice-president of appellants testified that probably fifty percent of mortgage lenders would accept appellants' policies in the catastrophe area.

We hold that there was substantial evidence to uphold the agency action.

Appellants contend in their second point of error that the trial court erred in holding the substantial evidence rule applied in this case. The contention is based primarily on the fact that the manner of review provided by statute, Tex. Ins. Code Ann. art. 1.04(f) (1963), is by trial *de novo* and the substantial evidence rule, applied by the trial court, was expressly inapplicable. Resolution of this issue involves consideration of the doctrine of separation of powers.

The Texas Constitution provides that the powers of government shall be divided into three distinct departments: legislative, executive and judicial, and that except in instances expressly permitted by the Constitution, "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others. ..." Tex. Const. art. II §1. Pursuant to this provision, legislative acts requiring judicial review of legislative or executive determinations of agencies by way of a trial *de novo* have been declared unconstitutional. Key Western Life Insurance Company v. State Board of Insurance, 350 S.W. 2d 839 (Tex. 1961). In other words, if a court reviews such agency action *de novo,* under the preponderance of the evidence rule, the court trespasses on that area of our government reserved to the legislature.

We must, therefore, decide in this appeal whether appellants' lawsuit involves the exercise of a legislative or

judicial function by the agency. "The action of an administrative body or officer is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule-making action, general and future in effect." *Id. at* 847. A major consideration in making the necessary determination is whether the agency's action concerns only the parties who are immediately affected or a wider group of those subject to the authority of the agency or even the public as a whole. Texas State Board of Health v. Harrison Clinic Hospital, 410 S.W. 2d 181 (Tex. 1966); Scott v. Texas State Board of Medical Examiners, 384 S.W. 2d 686 (Tex. 1964); Chemical Bank and Trust Company v. Falkner, 369 S.W. 2d 427 (Tex. 1963).

In our case appellants challenge the designation of the catastophe area and the credit for voluntarily written insurance, both of which have a much broader application and effect than upon appellants' business. As a result, we conclude that the question is legislative in nature, and, as Article 1.04(f) requires a *de novo* review on appeal to the courts, if applied in this case, it would violate Tex. Const. art. II, § 1. The proper judicial review is under the substantial evidence rule, as the trial court correctly held. See Davis v. City of Lubbock, 326 S.W. 2d 699 (Tex. 1959); Farmers and Merchants Insurance Company v. State Board of Insurance, 321 S.W. 2d 354 (Tex. Civ. App. 1959, writ ref'd n.r.e.).

The judgment of the trial court is affirmed.

John C. Phillips, Chief Justice

Affirmed
Filed: May 30, 1979

APPENDIX - 3

Article 21.49 Vernon's Annotated Texas Statutes

Sec. 5 (b) On or before 10 days after the effective date of this Act the Board shall appoint a temporary board of directors of the Association which shall consist of seven representatives of members of the Association, selected so as to fairly represent various classes of member insurers. Such temporary board of directors shall prepare and submit a plan of operation and shall serve until the permanent board of directors shall take office in accordance with said plan of operation.

(c) All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premiums of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as furnished to the Association by the Board after review of annual statements, other reports and other statistics the Board shall deem necessary to provide the information herein required and which the Board is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall, in accordance with the plan of operation, be entitled to receive credit for similar insurance voluntarily written in the area designated by the Board and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation. Each member's participation in the Association shall be determined annually in the same manner as the initial determination. For purposes of determining participation in the Association, two or more members having a common ownership or operating in this State under common management or control shall be treated as if they constituted a single member. Any insurer authorized to write and engaged in writing any insurance, the writing of which required such insurer to be a member of the Association, who becomes authorized to engage in writing such insurance after the effective date of this Act shall become a member of the Association on the 1st day of

January immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association.

(d) On or before 45 days after the effective date of this Act, the temporary board of directors of the Association shall submit to the Board for review and approval a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors and shall provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation, the establishment of necessary facilities, management of the Association, plan for assessment of members to defray losses and expenses, underwriting standards, procedures for the acceptance and cession of reinsurance, procedures for determining the amount of insurance to be provided to specific risks, time limits and procedures for processing applications for insurance, and for such other provisions as may be deemed necessary by the board of directors and the Board to carry out the purposes of this Act. The proposed plan shall be reviewed by the Board and approved, unless it finds that such plan does not properly fulfill the purposes of this Act. In the review of the proposed plan the Board may, in its discretion, consult with the directors of the Association and may seek any further information which it deems necessary for a decision. If the Board approves the proposed plan, it shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Board disapproves all or any part of the proposed plan of operation, it shall return the same to the directors with its written statement setting forth the reasons for the disapproval and any recommendations it may wish to make. The directors may alter the plan in accordance with the recommendations of the Board or shall, within 15 days from the date of disapproval, return a new plan to the Board. In the event the Association has not proposed a plan satisfactory to the Board on or before the 14th

day of May, 1971, the Board shall certify and adopt a plan under which the Association shall operate.

The Directors of the Association may, subject to the approval of the Board, amend the plan of operation at any time.

In the absence of an appeal, the Association shall adopt amendments to the plan proposed by the Board within 30 days.

Appeals

Sec. 9. Any person insured pursuant to this Act, or his duly authorized representative, or any affected insurer who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such act, ruling or decision, appeal to the Board. In the event the Association is aggrieved by the action of the Board with respect to any ruling, order, or determination of the Board, it may, within 30 days after such action, make a written request to the Board for a hearing thereon. The Board shall hear the Association, or the appeal from an act, ruling or decision of the Association, within 30 days after receipt of such request or appeal and shall give not less than 10 days' written notice of the time and place of hearing to the Association making such request or the person, or his duly authorized representative, appealing from the act, ruling or decision of the Association. Within 30 days after such hearing, the Board shall affirm, reverse or modify its previous action or the act, ruling or decision appealed to the Board. Pending such hearing and decision thereon, the Board may suspend or postpone the effective date of its previous rule or of the act, ruling or decision appealed to the Board. The Association, or the person aggrieved by any order or decision of the Board may thereafter appeal to the District Court of Travis County, Texas, and not elsewhere, in accordance with Article 1.04(f) of the Insurance Code of Texas.

APPENDIX - 4

Texas Catastrophe Property Insurance Association
Plan of Operation

ARTICLE II
ASSESSMENT OF MEMBERS

Section 1 - Assessment.

If the Chairman of the Board of Directors or any members of the Board of Directors determine that an assessment of the members is necessary, a special meeting of the Board of Directors shall be called to determine if the funds then available to the Association are:

A. of insufficient size to provide adequately for the operating expenses of the Association for the remainder of the then existing fiscal year of the Association (or if such special meeting is within sixty (60) days of the end of the then fiscal year, the Board of Directors may also determine if the funds available to the Association during the next fiscal year will be insufficient to adequately provide for the operating expenses of the Association for the next succeeding fiscal year); and/or

B. of insufficient size to adequately provide for an existing catastrophe loss or losses.

If the Board of Directors shall determine funds available to the Association are of insufficient size under the provisions of Section A and/or B, then it shall assess the members of the Association in such amount as it shall deem reasonable and necessary to provide for such operating expenses and/or such catastrophe loss or losses.

Section 2 - Amount of Assessment.

A. The Board of Directors shall determine which members of the Association shall participate in any assessment for operating expenses and/or catastrophe losses. This determination shall be computed on a syndicate year basis rather than on a calendar year basis. The designated members of the Association shall participate in any assessment

levied in the proportion that the net direct premiums (excluding premiums on property of the State of Texas, any city, political subdivision, or agency of the State) of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums (excluding premiums on property or the State of Texas, any city, political subdivision, or agency of the State) written in this State by all members of the Association as furnished to the Association by the Board after review of annual statements, other reports, and required statistics; provided, however, that if at the time of such assessment the Board has not furnished to the Association information necessary to compute a member's participation during the preceding calendar year then each member's participation shall be based upon information furnished to the Association from the last calendar year in which such information is available and, upon obtaining the necessary information from the Board the Association shall reassess or refund to each member such amounts as are necessary to properly reflect such member's participation; provided, further, that a member shall be entitled to receive the following credit for insurance, similar to catastrophe insurance, written in such catastrophe area:

TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION

PROCEDURE FOR DETERMINING THE PERCENT PARTICIPATION FOR MEMBERS OF THE TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION REFLECTING CREDIT FOR VOLUNTARY PREMIUMS WRITTEN IN THE DESIGNATED AREA.

ALL PREMIUMS ARE FOR IMMEDIATELY PRECEDING CALENDAR YEAR ENDING DECEMBER 31ST.

PART 1

Column 1(a) Statewide direct written premiums for extended coverage from Texas Special Page 14 - Column 1, Line 2. Premiums written by the Oil Insurance Association are deducted and replaced by each member company's actual quota share.

Premiums on public properties, as well as, assumed premiums written by TCPIA are excluded.

Column 1(b) Statewide direct written premiums for homeowners from Texas Special Page 14 -Line 4 and Line 27 combined.

Column 2 The sum of the Statewide direct written premiums at 90% of the extended coverage and 30% of the homeowners. (90% Column [1] (a) + 30% Column [1] (b)).

Column 3 Percentage of the total Statewide direct written premiums, described in Column [2], attributable to each member company and is the basis for indicating normal required participation in the Texas Catastrophe Property Insurance Association prior to credits for voluntary writings in the designated area.

Column 4 Total windstorm and hail premiums in the designated area (from Part III - Column [3]).

Column 5 Normal company quota of total windstorm and hail premiums:

Voluntary premiums written in designated area (X 1.0) Plus (+) association premiums at Association rates.

Amounts are determined by applying the percentages in Column [3] to the estimated wind and hail premiums designated areas - Column [4].

Column 6 Each company's voluntary windstorm and hail writings in the designated area (from Part II, Column [2]).

NOTE: Maximum credit shall be limited to company's normal quota.

Column 7 — Each company's relative quota after applying credits for voluntary writings (Column 5 minus Column 6). Disregard any negative premium quota.

NOTE: Offset figure is the total of the excess credits developed by maximum credits in Column [6].

Column 8 — Percentage participation of each member company in the Texas Catastrophe Property Insurance Association, prior to elimination of percentage for offset.

Column 9 — Final percentage participation of each member company in Texas Catastrophe Property Insurance Association.

PART II (PREMIUMS IN DESIGNATED AREA ONLY)

Column 1 (a) — Extended coverage direct written premiums on properties located in the *Beach & Coastal areas* as defined in the T.C.P.I.A. Manual.

Column 1(b) — Homeowners direct written premiums on properties located in the *Beach & Coastal areas* as defined in the T.C.P.I.A. Manual.

Column 2 — The sum of the extended coverage and homeowners premiums in Column 1 (a) and 1 (b) adjusted to reflect wind and hail only.

PART III TOTAL WIND AND HAIL PREMIUM IN THE DESIGNATED AREA:

Voluntary premiums written in designated area plus (+) Association premiums at Association rates.

The total amount column [3] is brought forward to Part I - Column [4], and is distributed among companies in direct proportion to their combined net premium subject to quota of extended coverage and homeowners as it relates to the total of all member companies.

APPENDIX - 5

AMENDMENT TO THE PLAN OF OPERATION OF THE TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION

Effective January 1, 1978
I.

Delete in its entirety the following language in Part one, Article I, Section 2, I:

"I. "Net Direct Premiums" means the sum of:

(1) 90% of the Gross Direct written premiums on the extended coverage line of business as reflected on line two of the insurer's last annual statement, and

(2) 30% of the Gross Direct written premiums on the sum of:

(a) The Homeowner's Multiple Peril Fire and Allied Portion Line of business as reflected on line four of the insurer's last annual statement, and

(b) The Homeowners' Multiple Peril Casualty Portion Line of business as reflected on line twenty-nine of the insurer's last annual statement."

and insert in lieu thereof the following language:

"I. "Net Direct Premiums" means the sum of the following premiums:

(1) 90% of the Direct written premiums on the Extended Coverage line of business as reflected on line two column (1) of the insurer's last annual statement.

(2) 90% of the Extended Coverage portion of the Direct written premiums on the Multiple Peril line of business as reported on line eight column (1) of the insurer's last annual statement, and

(3) 40% of the Direct written premiums on the Homeowners' Multiple Peril line of business as reported on line four column (1) of the insurer's last annual statement."

II.

Add the following language at the end of Subparagraph A of Section 2 of Article II of Part Three of the Plan of Operation of the Texas Catastrophe Property Insurance Association immediately following the words "written in such catastrophe area,"

"except that in no event shall the final percentage of participation after application of credit for voluntary writings in the catastrophe area be less than 20% nor more than 190% of the company's percentage of statewide windstorm and hail premiums modified by applicable offset factors."

III.

Delete in its entirety page 20 of the Plan of Operation of the Texas Catastrophe Property Insurance Association and in lieu thereof substitute new page 20 as follows:

Texas Catastrophe Property Insurance Association

PROCEDURE FOR DETERMINING THE PERCENT OF PARTICIPATION FOR MEMBERS OF THE TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION REFLECTING CREDIT FOR VOLUNTARY PREMIUMS WRITTEN IN THE DESIGNATED AREA.

ALL PREMIUMS ARE FOR MOST RECENT PRECEDING CALENDAR YEAR ENDING DECEMBER 31ST.

Column 1(a) Statewide direct written premiums for extended coverage from Texas Annual Statement Page 14, Line 2, Column (1).

Column 1(b) Statewide direct written premiums for the extended coverage portion of the multiple peril line from Texas Annual Statement, Page 14, Line 8, Column (1).

Column 1(c) Statewide direct written premiums for homeowners and farm and ranchowners from Texas Annual Statement, Page 14, Line 4, Column (1).

Column 2 The sum of the Statewide direct written premiums at 90% of the extended coverage and 40% of the homeowners. (90% Column [1] (a) + 90% of Column [1] (b) + 10% Column [1] (c).

Column 3 Each company's percentage of the net direct premiums as described in Column [2], which is the basis for indicating normal required participation in the Texas Catastrophe Property Insurance Association prior to credits for voluntary writings in the designated area.

Column 4 Total windstorm and hail premiums in the designated area (TCPIA premiums plus voluntary premiums).

Column 5 Normal company quota of total windstorm and hail premiums: Column [3] X Column [4].

Column 6 Each company's voluntary writings in the designated area multiplied by the same percentages as shown in Column [2] above.

NOTE: Maximum credit shall be limited to company's normal quota.

Column 7 Each company's maximum possible allocation after applying credits for voluntary writings (Column 5 minus Column 6). Negative allocation to be shown as zero.

Column 8 Percentage participation of each member company in the Texas Catastrophe Property

Insurance Association, prior to application of offset.

NOTE: The offset figure measures the excess premiums developed by maximum credits in Column [6].

Column 9 — Percentage participation of each member company in Texas Catastrophe Property Insurance Association prior to application of minimum-maximum factors.

Column 10 — Assignment after application of 20% minimum or 190% maximum of Column [3].

Column 11 — Net assignment in association. (After application of offset following minimum-maximum limitations.).

APPENDIX - 6

NO. 260,154

BEACON NATIONAL INSURANCE COMPANY AND FIRST PREFERRED INSURANCE COMPANY

VS.

TEXAS STATE BOARD OF INSURANCE AND TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

TO SAID HONORABLE COURT:

NOW COME Beacon National Insurance Company and First Preferred Insurance Company, Plaintiffs herein, and present to the Court this their First Amended Original Petition complaining of State Board of Insurance of the State of Texas and the Texas Catastrophe Property Insurance Association, and for grounds would show to the Court the following:

1.

Plaintiffs, Beacon National Insurance Company and First Preferred Insurance Company (hereinafter sometimes called "Beacon Insurance Group"), are domestic insurance companies chartered and licensed by the State of Texas to do business in this state with principal offices in Wichita Falls, Wichita County, Texas. Defendant, State Board of Insurance is an agency of the State of Texas composed of Chairman, Joe Christie, Ned Price and Durwood Manford, and citation may be served upon this Defendant by serving the Chairman at the offices of the State Board of Insurance

at 1110 San Jacinto Street, Austin, Texas. Defendant, Texas Catastophe Property Insurance Association is a State agency and this agency may be served with citation by serving Mr. Oran F. Needham, Chairman of the Board of Directors of this Defendant, at the offices of said Defendant at 1110 San Jacinto, Austin, Texas.

2.

Plaintiffs would show to the Court that this action is brought under Article 21.49 of the Insurance Code of the State of Texas, Article 1.04f of the Insurance Code of the State of Texas and Article 6252-13a, V.A.T.S. Plaintiffs allege that they have complied with all prerequisites of the laws and are entitled to bring this suit as an appeal from the ruling of the Texas Catastrophe Property Insurance Association dated October 4, 1976, and from the action of the State Board of Insurance dated March 8, 1977, and April 5, 1977, refusing to grant the relief sought by Plaintiffs and affirming the action of the Texas Catastrophe Property Insurance Association. Plaintiffs attach hereto as exhibits the applications for relief made by Plaintiffs and the rulings by Defendants thereon, which exhibits are marked Exhibits A through I, respectively.

3.

Plaintiff sought relief from the Texas Catastrophe Property Insurance Association and the State Board of Insurance for revision of the plan of operation, rules, regulations and designation of Catastrophe Area so as to effect a more equitable and fair operation of the Plan for all member companies. The Texas Catastrophe Property Insurance Association was created by Article 21.49 of the Texas Insurance Code and under its authority all property insurance companies doing business in the State of Texas are assigned a percentage of the property insurance placed through the Association in accordance with the terms of the Act. The December 31, 1975, statement of participation assigned these Plaintiffs 1.666% share of the Catastrophe Pool risks while these Plaintiffs had only a .738% of the total premiums written in the state during the year 1975. For the year 1976, these figures were 1.783% of the Pool participation and .822% of the premiums written in the State. Plaintiffs would show to

the Court that the larger insurance companies are able to write voluntary insurance in the "Catastrophe Area" and receive dollar-for-dollar credit against their Pool participation. As a result, many of the largest insurance companies in the state are able to select their risks in the "Catastrophe Area" and eliminate their participation in the Catastrophe Pool. Smaller companies, such as Plaintiffs, have more difficulty in writing voluntary insurance in the "Catastrophe Area" because mortgage companies and other lenders refuse to accept policies written by many of the members of the Texas Catastrophe Property Insurance Association but instead give preference to the policies of the larger member insurance companies. Defendants have refused to decrease the dollar-for-dollar credit given for voluntary insurance premiums written in the "Catastrophe Area" even in those portions of the Catastrophe Area where property insurance is generally available and no necessity for Catastrophe Pool insurance exists. Also, the Defendants have refused to increase the credit given for voluntary insurance written in those areas of the "Catastrophe Area" where the bulk of the Catastrophe Pool insurance lies. In this connection, Plaintiffs would show to the Court that approximately 60% of the Catastrophe Pool insurance lies in two counties, Galveston and Brazoria Counties and only 10% in Nueces County, 4%-5% in Cameron County and 10% in Jefferson County. The "Catastrophe Area" consists of all of the counties in Texas bounded by the Gulf of Mexico. Defendants have refused to do anything to prevent the concentration of the Catastrophe Pool insurance in only two counties of the Catastrophe Area, although this concentration could be relieved by either adjusting the amount of credit given for writing voluntary insurance or by reducing the size of the "Catastrophe Area".

4.

Plaintiffs are suffering irreparable harm and damage since the Texas Catastrophe Property Insurance Association continues to place new policies of insurance with these Plaintiffs and all of the risks covered by these insurance policies are extra-hazardous and have been previously turned down by other insurers. As a result, Plaintiffs are being forced to ac-

cept extra-hazardous risks concentrated in one particular area so that if a hurricane or major catastrophe strikes the particular area, these Plaintiffs will suffer a proportionately far greater loss than other insurance companies doing business in the state which have been able to effectively eliminate their Catastrophe Pool participation. Plaintiffs therefore pray that a temporary injunction issue during the pendency of this suit enjoining Defendants from placing new or additional policies of insurance with these Plaintiffs and from taking any punitive measures against these Plaintiffs for obtaining such injunction and refusing such additional policies. Further, Plaintiffs pray that said temporary injunctions be made permanent upon final hearing hereof. Plaintiffs would further show to the Court that they have no adequate remedy at law to protect themselves and that they have exhausted all rights of appeal through the administrative channels of the Defendant agencies herein.

5.

Plaintiffs would further show to the Court that they have made an attempt to place insurance voluntarily in the Catastrophe Area but that they have been unable to do so to a sufficient degree to even maintain a Catastrophe Pool participation percentage equal to their statewide insurance premiums percentage. This is so even though Plaintiff, First Preferred Insurance Company, is a deviated rate company, offering a 20% deviation (or discount) from manual rates offered by most other insurance companies in the State of Texas. Although mortgage companies and other lenders refuse to accept the policies in many instances of these Plaintiffs, they will accept the policies when the insurance is placed through the Texas Catastrophe Property Insurance Association. Aside from the effect on these Plaintiffs, the effect on the policyholders in the Catastrophe Area is that they cannot obtain the deviated rates (or discounted rates) of up to 20% less than the manual rates offered by insurance companies such as First Preferred Insurance Company. Thus, the large insurance companies are able not only to select their risk within the Catastrophe Area but also to charge higher, non-competitive rates for their premiums in that area, and obtain dollar-for-dollar credit based on the manual rates

while companies such as First Preferred Insurance Company, charging only 80% of the manual rates, receive in effect, only 80% of the credit which the large insurance companies receive for writing the same business.

6.

In the alternative and without waiving the foregoing, Plaintiffs would show to the Court that Article 21.49 of the Texas Insurance Code is unfair and discriminatory in operation and, therefore, violative of both the Constitution of the State of Texas and the Constitution of the United States. In this connection, Plaintiffs say that in operation and effect, Article 21.49 of the Texas Insurance Code violates Article 1, Sections 3, 13, 16, 17 and 19 of the Texas Constitution and Article 1, Section 10, Amendment 5 and Amendment 14 of the United States Constitution. In support thereof, Plaintiffs would show to the Court that the Board of Directors authorized by Article 21.49 is composed of the larger insurance companies doing business in the State of Texas, that such board promulgated a "Plan of Operation" for the Texas Catastrophe Property Insurance Association, that in its operation many of the members of the Board have virtually a zero percentage of participation in the Catastrophe Pool, whereas, most of the smaller insurance companies, such as these Plaintiffs have a Pool participation more than double their statewide percentage. This is due largely to the fact that the large insurers can obtain credit against Pool participation based on their voluntary writings in the "catastrophe area" and, because of their size are able to pick and choose their risks within the "catastrophe area". The smaller insurance companies are not able to write insurance voluntarily in the "catastrophe area" because of both a limitation in the number of agencies available to them and the refusal of lenders to accept policies from smaller companies. Further, the Texas Catastrophe Property Insurance Association has permitted the Catastrophe Pool to be concentrated in two counties so that more than 60% of the Pool is located in Galveston and Brazoria counties. As a result, Plaintiffs are denied the opportunity to have any voice in directing the Association and are arbitrarily and discriminatorily assigned a percentage of the Pool participa-

tion more than twice their statewide percentage of insurance writings in order to make up the participation which the large insurers have not been required to assume. In addition, Plaintiffs' participation is concentrated in the two counties mentioned above and subjects them and other smaller insurance companies similarly situated to the extra hazard of sustaining an extraordinarily large loss in the event a large hurricane were to strike the Texas coast at Galveston and Brazoria counties. Defendants have refused to correct this situation and have continued to permit the larger insurers to enjoy the advantages unfairly granted to them by the Statute and the actions of the Board of Directors of the Texas Catastrophe Property Insurance Association.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that citation be issued and served on Defendants herein and that upon hearing Plaintiffs be granted the temporary relief prayed for above and that on final hearing hereof Plaintiffs' temporary injunctions be made permanent and Defendants' Orders denying Plaintiffs' pleas for relief be set aside in all things and that this Court enter its Order setting a more equitable basis for credits to be given for voluntary writings of insurance in the Catastrophe Area, resetting the boundaries of such Catastrophe Area or, alternatively, declaring Article 21.49, Texas Insurance Code, to be unconstitutional and void, and entering such other orders to which Plaintiffs may show themselves entitled, including costs of suit.

Respectfully submitted,

/s/ Joe E. Shaddock

Joe E. Shaddock
318 City National Building
Wichita Falls, Texas 76301

Attorney for Plaintiffs,
Beacon National Insurance Company and
First Preferred Insurance Company

STATE OF TEXAS
COUNTY OF WICHITA

BEFORE ME, the undersigned authority, on this day personally appeared Joe E. Shaddock, who, being by me duly sworn, on oath says that he is duly authorized to act for the Plaintiffs, Beacon National Insurance Company and First Preferred Insurance Company, in the above styled and numbered cause, that he is duly authorized to make this affidavit and that the foregoing plea and every statement, allegation and denial thereof are true.

/s/ Joe E. Shaddock
Affiant

SWORN TO AND SUBSCRIBED BEFORE ME by the said Joe E. Shaddock, this 11th day of August, 1977, to certify which witness my hand and seal of office.

/s/ Diana Jackson
Notary Public in and for
Wichita County, Texas

APPENDIX - 7

NO. 260,154 - A
BEACON NATIONAL INSURANCE COMPANY, ET AL
VS.
STATE BOARD OF INSURANCE, ET AL

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

ORDER ON ADMINISTRATIVE APPEAL

By pretrial order previously entered in this cause, the Court held that Plaintiffs' petition stated two separate and divisible causes of action, one being an administrative appeal under Article 21.49 of the Texas Insurance Code, Article 1.04f of the Texas Insurance Code, and Article 6252-13a, V.A.T.S., and the other a suit to determine questions as to the constitutionality of the statute. The Court has also previously held that the administrative appeal portion of the suit is controlled by the Texas Register and Administrative Procedure Act, Article 6252-13a V.A.T.S. and subject to review under the Substantial Evidence Rule. The Court then severed the administrative appeal and the administrative appeal was submitted to the Court upon the basis of the record before the State Board of Insurance and the brief of the parties; and the Court having considered all material pertinent to that portion of the case and finding that the Order entered herein by the State Board of Insurance was not arbitrary, capricious or unreasonable but is instead reasonably supported by substantial evidence;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the administrative appeal filed by Plaintiffs, Beacon National Insurance Company and First Preferred Insurance Company, is hereby denied in all things as against Defendant, Texas State Board of Insurance and Texas

Catastrophe Property Insurance Association, and that Plaintiffs are entitled to no relief for the cause of action heretofore designated Phase I of this case.

ENTERED this 3rd day of October, 1978.

/s/ Harley Clark
Harley Clark
Judge Presiding

Supreme Court, U. S.
FILED
JUN 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79 - 1818

* * *

BEACON NATIONAL INSURANCE COMPANY AND FIRST PREFERRED INSURANCE COMPANY,

Petitioners

V.

TEXAS STATE BOARD OF INSURANCE AND TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,

Respondents

* * *

On Petition For Writ of Certiorari To The Court Of Civil Appeals For The Third Supreme Judicial District Of Texas At Austin, Texas

* * *

BRIEF IN OPPOSITION

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

THOMAS M. POLLAN
Assistant Attorney General

CATHERINE BROWN FRYER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4481

Attorneys for Respondent
Texas State Board of Insurance

SUBJECT INDEX

	Page
INDEX OF AUTHORITIES	ii
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT AND AUTHORITIES	4
CONCLUSION	8
APPENDIX	A-1

INDEX OF AUTHORITIES

Cases	Page
Atlas Roofing Company v. Occupational Safety and Health Review Commission, et al., 430 U.S. 442 (1977)	7
Bank of North America v. State Banking Board, 482 S.W.2d 923 (Tex.Civ.App. - Austin), *writ ref'd n.r.e. per curiam*, 492 S.W.2d 450 (Tex. 1973)	7
Block v. Hirsh, 256 U.S. 135 (1921)	7
Chemical Bank and Trust Co. v. Faulkner, 369 S.W.2d 427 (Tex. 1963)	5
Curtis v. Loether, 415 U.S. 189 (1974)	7
Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1959)	5
Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972)	7
Iacapone v. New Amsterdam Casualty Co., 258 F.Supp. 880 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968)	7
Key Western Life Insurance Co. v. State Board of Insurance, 163 Tex. 11, 350 S.W.2d 839 (1961)	5
Kremens v. Bartley, 431 U.S. 119 (1977)	7
Martinez v. Texas State Board of Medical Examiners 476 S.W.2d 400 (Tex.Civ.App. - San Antonio 1972, writ ref'd n.r.e.) *appeal dismissed* 409 U.S. 1020 (1972)	7
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	7
New York Times v. Jascalevich, 439 U.S. 1317 (1978)	6
Olsen v. Trust Company of Chicago, 245 F.2d 522 (7th Cir. 1957) *cert. denied*, 355 U.S. 896 (1957)	7

Scott v. Texas State Board of Medical Examiners,
384 S.W.2d 686 (Tex. 1964) 5

Texas State Board of Health v.
Harrison Clinic Hospital
410 S.W.2d 181 (Tex. 1966) 5

OTHER AUTHORITIES

Tex. R. Civ. P. 468 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-1818

* * *

BEACON NATIONAL INSURANCE COMPANY AND FIRST PREFERRED INSURANCE COMPANY,

Petitioners

V.

TEXAS STATE BOARD OF INSURANCE AND TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,

Respondents

* * *

On Petition For Writ Of Certiorari
To The Court Of Civil Appeals For The
Third Supreme Judicial District Of
Texas At Austin, Texas

* * *

BRIEF IN OPPOSITION

* * *

Respondent Texas State Board of Insurance respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered in the above entitled case on May 30, 1979.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, is reported at 584 S.W.2d 616 and appears as appendix 4 to the petition for writ of certiorari.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although respondent disputes petitioners' contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

1. Whether this cause of action presents a substantial federal question?
2. Whether petitioners were entitled to a jury trial in an appeal from an administrative decision of a state agency?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although petitioners contend that many constitutional provisions are involved, respondent submits that the seventh amendment to the United States Constitution is the only relevant constitutional provision. The seventh amendment of the United States Constitution is appendix 1 herein.

Article 21.49 of the Texas Insurance Code is the only material statutory provision involved, and it is set out as appendix 2 to this brief.

STATEMENT OF THE CASE

The Texas Catastrophe Property Insurance Association was established pursuant to the provisions of the Texas Catastrophe Property Insurance Pool Act, article 21.49, Texas Insurance Code. The purpose of this

Act is "to provide a method whereby adequate windstorm, hail and fire insurance may be obtained in certain designated portions of the State of Texas." Article 21.49, §1, Texas Insurance Code. The Association consists of all property insurers authorized to transact property insurance in Texas. Article 21.49, §4, Texas Insurance Code. Petitioners herein are members of the Association.

In order to effectuate its stated purpose, the Act provides for the appointment of a board of directors of the Association and directs that board of directors to prepare and submit a plan of operation to the Texas State Board of Insurance for approval. Article 21.49, §5(b) and (d), Texas Insurance Code. It is the effect of this plan of operation which has formed the basis of petitioners' complaint.

In July of 1976, petitioners filed an application for hearing before the board of directors of the Texas Catastrophe Property Insurance Association seeking a revision of the plan of operation, rules and regulations for the Association and a revised designation of catastrophe area. The board of directors denied petitioners' request and petitioners appealed this decision to the Texas State Board of Insurance in accordance with Section 9 of the Act. After a full public hearing on the matter on November 19, 1976, the Board concluded that, pursuant to article 21.49, Texas Insurance Code, the Texas Catastrophe Insurance Association was authorized to apply its formula of participation to petitioners. Further, the Board found that the formula for the participation of petitioners had been properly applied by the Texas Catastrophe Property Insurance Association. From this decision by the State Board of Insurance, petitioners appealed to the 53rd Judicial District Court of Travis County, Texas.

In their original and first amended original petitions, petitioners not only sought judicial review of the order of the State Board of Insurance but also challenged the

constitutionality of article 21.49, Texas Insurance Code. The causes of action were severed and tried separately. The administrative appeal was heard and decided first and is the basis of the petition for writ of certiorari now before this Court. Subsequently, the constitutional law issues raised by petitioners were tried under a separate cause number, and that part of the case is now pending before the Court of Civil Appeals for the Third Supreme Judicial District of Texas under cause number 13,096.

Only petitioners' administrative appeal has become final in the Texas courts. In their petition for writ of certiorari, petitioners are prematurely attempting to raise constitutional law issues which have not been finally resolved at the state court level.

ARGUMENT AND AUTHORITIES

I.

PETITIONERS HAVE NOT PRESENTED A SUBSTANTIAL FEDERAL QUESTION

A. The opinion of the court below is based solely upon state grounds.

Despite their attempts to characterize this cause as a constitutional law case, petitioners are actually urging this Court to exercise its jurisdiction to review a state appellate court decision which is based solely upon principles of state law. The federal law questions which petitioners have raised in their petition for writ of certiorari are premature as those issues are pertinent to the cause of action still pending in the court of civil appeals.

A cursory reading of the opinion of the court below discloses that the questions considered and ruled upon by the court were twofold: (1) whether the standard of review of the administrative order should be by trial de novo or by substantial evidence, and, if a substantial evidence review was proper, (2) whether there was

substantial evidence in the record to support the order of the State Board of Insurance. In deciding these issues, the court below relied upon longstanding Texas case law precedent. No questions of federal statutory or constitutional law were before the court, and none were cited as a basis for the court's decision.

In determining the proper standard of judicial review, the court below relied upon the Texas Supreme Court cases of *Texas State Board of Health v. Harrison Clinic Hospital*, 410 S.W.2d 181 (Tex. 1966); *Scott v. Texas State Board of Medical Examiners*, 384 S.W.2d 686 (Tex. 1964); *Chemical Bank and Trust Co. v. Faulkner*, 369 S.W.2d 427 (Tex. 1963); and *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (1959). Petitioners had requested the State Board of Insurance to alter the plan of operation of the Texas Catastrophe Property Insurance Association, a change which would affect all members of the state-wide association of insurers. Based upon the above-cited cases, the Court of Civil Appeals reasoned that the relief sought by petitioners required the exercise of the Board's legislative powers and that, therefore, the agency action was not susceptible to a de novo review by the courts. To hold otherwise would violate article II, section 1, of the Texas Constitution, guaranteeing separation of powers in state government. *Key Western Life Insurance Company v. State Board of Insurance*, 163 Tex. 11, 350 S.W.2d 839 (1961).

After considering the administrative record and the briefs and oral arguments of counsel, the court below concluded that there was substantial evidence in the record to support the order of the State Board of Insurance. Again, this decision was grounded solely upon state law.

Contrary to petitioners' assertions, no issues of federal statutory or constitutional law were addressed or decided by the court of civil appeals in the opinion under attack.

B. The constitutional law issues presented by petitioners are still pending in the Texas courts.

As evidenced by the trial court's order of severance, appendix 3, petitioners' challenge to the constitutionality of article 21.49, Texas Insurance Code, was given a new cause number and treated as a separate cause of action. After trial, the district court in that case found article 21.49 to be constitutional. Petitioners appealed this decision to the court of civil appeals.

Subsequent to entry of the judgment upholding the constitutionality of article 21.49, the statute was amended by Acts 1979, 66th leg., p. 1599, ch. 675, §1, eff. Aug. 27, 1979. On appeal, the court of civil appeals found that the amended portion of the statute was intended to alleviate the problems complained of by petitioners. Further, the court found that the record before it did not pertain to the amended statute and that any decision regarding the constitutionality of the prior statute would be advisory only. Therefore, the cause was dismissed for mootness. The opinion of the court of civil appeals in cause number 13,096 is appendix 4 herein. Petitioners have filed a motion for rehearing to the court's opinion. Such a motion is a prerequisite to the filing of an application for writ of error to the Texas Supreme Court. Tex. R. Civ. P. 468. To date, petitioners' motion for rehearing has not been ruled on by the court of civil appeals.

Thus, the constitutional law issues raised by petitioners are currently pending in the Texas courts. This Court has jurisdiction to review state court decisions with respect to issues of federal law only where the state court judgment is final. 28 U.S.C. §1257 (1966); *New York Times v. Jascalevich*, 439 U.S. 1317 (1978). Since the state court judgment on the constitutionality of article 21.49 has not become final, this Court should not exercise jurisdiction over that issue.

In addition, respondent respectfully submits that,

even if the constitutional law questions were properly before this Court, the amendment of article 21.49, Texas Insurance Code, renders the issue of the constitutionality of the prior statute moot. *Kremens v. Bartley*, 431 U.S. 119 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972).

II.

PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL IN AN APPEAL FROM A STATE ADMINISTRATIVE PROCEEDING.

Under state law, petitioners were not entitled to a jury trial in their appeal from the order of the Texas State Board of Insurance. *Bank of North America v. State Banking Board*, 482 S.W.2d 923 (Tex. Civ. App. -- Austin), *writ ref'd n.r.e. per curiam*, 492 S.W.2d 450 (Tex. 1973); *Martinez v. Texas State Board of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App. -- San Antonio 1972, writ ref'd n.r.e.), *appeal dismissed*, 409 U.S. 1020 (1972). Therefore, petitioners urge this Court expand the protection of the fourteenth amendment to the Constitution to include the seventh amendment right to trial by jury in civil cases. Similar opportunities to hold the seventh amendment applicable to the states have been rejected by the federal courts in the past. *Iacaponi v. New Amsterdam Casualty Co.*, 258 F.Supp. 880 (W.D. Pa. 1966), *aff'd*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *Olesen v. Trust Co. of Chicago*, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957). In this case, such a decision would not benefit petitioners. Even in federal courts, the seventh amendment does not require trial by jury in administrative proceedings where no civil penalties are being assessed. *Atlas Roofing Company v. Occupational Safety and Health Review Commission, et al.*, 430 U.S. 442 (1977); *Curtis v. Loether*, 415 U.S. 189 (1974); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Block v. Hirsh*, 256 U.S. 135 (1921).

This cause does not present circumstances which would justify this Court's expansion of the aegis of the fourteenth amendment to cover the seventh amendment right to a trial by jury in civil cases. Neither state nor federal constitutional law requires a jury trial in an appeal from an administrative decision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

CATHERINE BROWN FRYER
Assistant Attorney General

THOMAS M. POLLAN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-4481

Counsel for Respondent
Texas State Board of Insurance

PROOF OF SERVICE

I, Thomas M. Pollan, Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Brief in Opposition have been deposited in the United States mail, air mail, certified, postage prepaid, on this the _____ day of June, 1980, to each of the following addresses: Mr. Joe E. Shaddock, 318 City National Building, Wichita Falls, Texas 76301, Attorney for Petitioners; and Mrs. Mary Joe Carroll, Clark, Thomas, Winters, & Shapiro, P.O. Box 1148, Austin, Texas 78767, Attorney for the Texas Catastrophe Property Insurance Association.

THOMAS M. POLLAN
Assistant Attorney General

APPENDIX 1

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX 2

Article 21.49, Texas Insurance Code

Catastrophe Property Insurance Pool Act

Declaration and Purpose

Section 1. It is hereby declared by the Legislature that an adequate market for windstorm, hail and fire insurance is necessary to the economic welfare of the State of Texas and that without such insurance the orderly growth and development of the State of Texas would be severely impeded. It is therefore the purpose of this Act to provide a method whereby adequate windstorm, hail and fire insurance may be obtained in certain designated portions of the State of Texas.

Name of Act

Section 2. This Act shall be known as the "Texas Catastrophe Property Insurance Pool Act."

Definitions

Section 3. In this Act, unless the context clearly dictates to the contrary:

(a) "Board" means the State Board of Insurance of the State of Texas.

(b) "Association" means the Texas Catastrophe Property Insurance Association as established pursuant to the provisions of this Act.

(c) "Plan of Operation" means the plan for providing Texas windstorm and hail insurance in a catastrophe area and Texas fire and explosion insurance in an adequate fire insurance area which plan has been approved by the Board for operation by the Association pursuant to the provisions of this Act, which plan may, among other things, provide for limits of liability for each structure insured, and/or the corporeal movable property located therein.

(d) "Texas Windstorm and Hail Insurance" means

deductible insurance against direct loss to insurable property as a result of windstorm or hail as such terms shall be defined and limited in policies and forms approved by the State Board of Insurance.

(e) "Texas Fire and Explosion Insurance" means insurance against direct loss to insurable property as a result of fire and explosion as such terms shall be defined and limited in policies and forms approved by the State Board of Insurance.

(f) "Insurable Property" means immovable property at fixed locations in a catastrophe area or corporeal movable property located therein (as may be designated in the plan of operation) which property is determined by the Association, pursuant to the criteria specified in the plan of operation to be in an insurable condition against windstorm, hail and/or fire and explosion as appropriate, as determined by normal underwriting standards; provided, however, that insofar as windstorm and hail insurance is concerned, any structure located within the seacoast territory as defined by the State Board of Insurance in the General Basis Schedule, commenced on or after the 30th day following the publication of the plan of operation, not built or continuing in compliance with building specifications set forth in the plan of operation shall not be an insurable risk under the terms of this Act. A structure, or an addition thereto, which is constructed in conformity with plans and specifications that comply with the specifications set forth in the plan of operation at the time construction commences shall not be declared ineligible for windstorm and hail insurance as a result of subsequent changes in the building specifications set forth in the plan of operation. When repair of damage to a structure involved replacement of items covered in the building specifications as set forth in the plan of operation, such repairs must be completed in a manner to comply with such specifications for the structure to continue within the definition of Insurable Property for windstorm and hail insurance. Nothing in this Act shall preclude special rating of individual risks

as may be provided in the plan of operation.

(g) "Net Direct Premiums" means gross direct written premiums less return premiums upon canceled contracts (irrespective of reinsurance assumed or ceded) written on property in this State as defined by the Board of Directors of the Association.

(h) "Catastrophe Area" means a city or county in which it may be determined by the Board, after notice of not less than 10 days and a hearing, that windstorm and hail insurance is not reasonably available to a substantial number of owners of insurable property within such city or county, due to such insurable property being located within a city or county subject to unusually frequent and severe damage resulting from windstorm and/or hailstorms. Such designation shall be revoked by the Board if it determines, after notice of not less than 10 days and a hearing, that windstorm and hail insurance in such catastrophe area is no longer reasonably unavailable to a substantial number of owners of insurable property within such designated city or county. If the Association shall determine that windstorm and hail insurance is no longer reasonably unavailable to a substantial number of owners of insurable property in any designated catastrophe area or areas, then the Association may request in writing that the Board revoke the designation of any or all of such catastrophe areas and, after notice of not less than 10 days and a hearing, but within 30 days of such hearing, the Board shall either approve or reject the Association's request and shall, if such request be approved, revoke such designation or designations.

(i) "Inadequate Fire Insurance Area" means a city or county which is, or is within an area, designated as a catastrophe area, as defined in Paragraph (h), above, and in which it may be determined by the Board, after notice of not less than 10 days and a hearing, that fire and explosion insurance is not reasonably available to a substantial number of owners of insurable property within such city or county. Such designation shall be revoked by the Board if it determines, after 10 days'

notice and a hearing, that fire and explosion insurance in such inadequate fire insurance area is no longer reasonably unavilable to a substantial number of owners of insurable property within such designated city or county. If the Association shall determine that fire and explosion insurance is no longer reasonably unavailable to a substantial number of owners of insurable property in any designated inadequate fire insurance area or areas, then the Association may request in writing that the Board revoke the designation of any or all such inadequate fire insurance areas, and, after notice of not less than 10 days and a hearing, but within 30 days of such hearing, the Board shall either approve or reject the Association's request and shall, if such request is approved, revoke such designation or designations.

(j) "Insurance" as hereinafter used in this Act shall mean the types of insurance described in Paragraphs (d) and (e) of this Section 3.

(k) "Insurers" means all property insurers authorized to transact property insurance in this State and specifically includes and makes this Act applicable to county mutual companies, Lloyds and reciprocal or interinsurance exchanges, but shall not include (a) farm mutual insurance companies as authorized in Chapter 16 of this Code; (b) county mutual fire insurance companies which are writing exclusively industrial fire insurance policies as defined in Article 17.02 of this Code; and (c) any companies now operating under Chapters 12 and 13 of Title 78 of the Revised Civil Statutes of Texas, 1925, as amended, which have heretofore been repealed.

Creation of the Texas Catastrophe Property Insurance Association

Sec. 4. (a) The Association which is hereby created shall consist of all property insurers authorized to transact property insurance in this State, except those companies that are prevented by law from writing coverages available through the pool on a Statewide basis.

Every such insurer shall be a member of the Association and shall remain a member of the Association so long as the Association is in existence, as a condition of its authority to transact the business of insurance in this State. Any insurer which ceases to be a member of the Association shall remain liable on contracts of insurance entered into during its membership in the Association to the same extent and effect as if its membership in the Association had not been terminated.

(b) The organizational plan of certain types of insurers precludes such insurers from writing insurance coverage for the State of Texas, any city, political subdivision or agency of the State. When insuring property of the State of Texas, any city, political subdivision or agency of the State, the Association shall not cause such policies to be issued in such companies, nor shall such companies be included as reinsurers for any policies of insurance in this category.

Operation of the Texas Catastrophe Property Insurance Association

Sec. 5. (a) The Association shall, pursuant to the provisions of this Act and the plan of operation, and with respect to insurance on insurable property, have the power on behalf of its members to cause to be issued policies of insurance to applicants, to assume reinsurance from its members, and to cede reinsurance to its members and to purchase reinsurance on behalf of its members.

(b) On or before 10 days after the effective date of this Act the Board shall appoint a temporary board of directors of the Association which shall consist of seven representatives of members of the Association, selected so as to fairly represent various classes of member insurers. Such temporary board of directors shall prepare and submit a plan of operation and shall serve until the permanent board of directors shall take office

in accordance with said plan of operation.

(c) All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premiums of such member written in this State during the preceding calendar year bears to the aggregate net direct premiums written in this State by all members of the Association, as furnished to the Association by the Board after review of annual statements, other reports and other statistics the Board shall deem necessary to provide the information herein required and which the Board is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall, in accordance with the plan of operation, be entitled to receive credit for similar insurance voluntarily written in the area designated by the Board and its participation in the writings in the Association shall be reduced in accordance with the provisions of the plan of operation. Each member's participation in the Association shall be determined annually in the same manner as the initial determination. For purposes of determining participation in the Association, two or more members having a common ownership or operating in this State under common management or control shall be treated as if they constituted a single member. Any insurer authorized to write and engaged in writing any insurance, the writing of which required such insurer to be a member of the Association, who becomes authorized to engage in writing such insurance after the effective date of this Act shall become a member of the Association on the 1st day of January immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association.

(d) On or before 45 days after the effective date of this Act, the temporary board of directors of the Association

shall submit to the Board for review and approval a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors and shall provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation, the establishment of necessary facilities, management of the Association, plan for assessment of members to defray losses and expenses, underwriting standards, procedures for the acceptance and cession of reinsurance, procedures for determining the amount of insurance to be provided to specific risks, time limits and procedures for processing applications for insurance, and for such other provisions as may be deemed necessary by the board of directors and the Board to carry out the purposes of this Act. The proposed plan shall be reviewed by the Board and approved, unless it finds that such plan does not properly fulfill the purposes of this Act. In the review of the proposed plan the Board may, in its discretion, consult with the directors of the Association and may seek any further information which it deems necessary for a decision. If the Board approves the proposed plan, it shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Board disapproves all or any part of the proposed plan of operation, it shall return the same to the directors with its written statement setting forth the reasons for the disapproval and any recommendations it may wish to make. The directors may alter the plan in accordance with the recommendations of the Board or shall, within 15 days from the date of disapproval, return a new plan to the Board. In the event the Association has not proposed a plan satisfactory to the Board on or before the 14th day of May, 1971, the Board shall certify and adopt a plan under which the Association shall operate.

The Directors of the Association may, subject to the approval of the Board, amend the plan of operation at any time.

In the absence of an appeal, the Association shall adopt amendments to the plan proposed by the Board within 30 days.

Board Orders

Sec. 5A. (a) After notice and a hearing as provided in Subsection (b) of this section, the Board may issue any orders which it considers necessary to carry out the purposes of this Act including, but not limited to, maximum rates, competitive rates, and policy forms.

(b) Before an order is adopted by the Board, it shall post notice of a hearing on the order at the Secretary of State's office in the State Capitol and shall hold a hearing to consider the proposed order. Any person may appear and testify for or against the adoption of the order.

Eligibility: Application

Sec. 6. (a) Any person having an insurable interest in insurable property located in an area designated by the Board shall be entitled to apply to the Association for insurance provided for under the plan of operation and for an inspection of the property under such rules and regulations, including an inspection fee, if any, as determined by the Board of Directors of the Association and approved by the State Board of Insurance. The term "insurable interest" as used in this subsection shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage. Application shall be made on behalf of the applicant by a Local Recording Agent and shall be submitted on forms prescribed by the Association. The application shall contain a statement as to whether or not the applicant has or will submit the premium in full from personal

funds, or if not, to whom a balance is or will be due.

(b) If the Association determines that the property is insurable, the Association, upon payment of the premium, shall cause to be issued a policy of insurance as may be provided in the plan for a term of one year.

In the event an agent or some other person, firm, or corporation shall finance the payment of all or a portion of the premium and there is a balance due for the financing of such premium and such balance, or any installment thereof, is not paid within 10 days after the due date, the agent or other person, firm, or corporation to whom such balance is due may request cancellation of the insurance by returning the policy, with proof that the insured was notified of such return, or by requesting the Association to cancel such insurance by notice mailed to the insured and any others shown in the policy as having an insurable interest in the property. Upon completion of cancellation, the Association shall refund the unearned premium, less any minimum retained premium set forth in the plan of operation, to the person, firm, or corporation to whom the unpaid balance is due. In the event an insured requests cancellation of insurance, the Association shall make refund of such unearned premium payable to the insured and the holder of an unpaid balance. The Local Recording Agent, who submitted the application, shall refund the commission on any unearned premium in the same manner.

(c) Any policy issued pursuant to the provisions of this Act may be renewed annually, upon application therefor, so long as the property continues to meet the definition of "insurable property" set forth in Section 3 of this Act.

Deletion of Coverages From Other Policies

Sec. 7. The Board shall prepare endorsements and forms applicable to the standard policies which it has promulgated providing for the deletion of coverages

available through the Association and shall promulgate the applicable reduction of premiums and rates for the use of such endorsements and forms.

Rates, Rating Plans and Rate Rules Applicable

Sec. 8. (a) The Association shall file with the Board every manual of classifications, rules, rates which shall include condition charges, every rating plan, and every modification of any of the foregoing which it proposes to use. Every such filing shall indicate the character and the extent of the coverage contemplated and shall be accompanied by the policies and endorsements forms proposed to be used, which said forms and endorsements may be designed specifically for use by the Association and without regard to other forms filed with, approved by, or promulgated by the Board for use in this State.

(b) For the purpose of making such filing the Association may utilize filings made by licensed rating organizations and it may utilize the loss or expense statistics or recommendations collected and furnished to the Board by an advisory organization authorized under Article 5.73, Insurance Code of Texas.

(c) Any filing made by the Association pursuant hereto shall be submitted to the Board and as soon as reasonably possible after the filing has been made the Board shall, in writing, approve, modify, or disapprove the same; provided that any filing shall be determined approved unless modified or disapproved within 30 days after date of filing.

(d) If at any time the Board finds that a filing so approved no longer meets the requirements of this Act, it may, after a hearing held on not less than 20 days' notice to the Association specifying the matters to be considered at such hearing, issue an order withdrawing its approval thereof. Said order shall specify in what respects the Board finds that such filing no longer meets the requirements of this Act and shall be effective not less than 30 days after its issuance.

(e) All rates shall be made in accordance with the following provisions:

(1) Due consideration shall be given to the past and prospective loss experience within and outside the State of hazards for which insurance is made available through the plan of operation, if any, to expenses of operation including acquisition costs, to a reasonable margin for profit and contingencies, and to all other relevant factors, within and outside the State.

(2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in such risks on the basis of any or all of the factors mentioned in the preceding paragraph. Such rates may include rules for classification of risks insured hereunder and rate modifications thereof. All such provisions, however, as respects rates, classifications, standards and premiums shall be without prejudice to or prohibition of provision by the Association for consent rates on individual risks if the rate and risk are acceptable to the Association and as is similarly provided for, or as is provided for, in Article 5.26(a), Texas Insurance Code, and this provision or exception on consent rates is irrespective of whether or not any such risk would otherwise be subject to or the subject of a provision of rate classification or eligibility.

(3) Rates shall be reasonable, adequate, not unfairly discriminatory, and nonconfiscatory as to any class of insurer.

(4) Commissions paid to agents shall be reasonable, adequate, not unfairly discriminatory and nonconfiscatory.

(f) For the purpose of this Act the applicant under Section 6(a) hereof shall be considered to have consented to the appropriate rates and classifications authorized by this Act irrespective of any and all other rates or classifications.

(g) All premiums written and losses paid under this Act as appropriate shall be included in applicable classifications for general rate making purposes.

(h) Except as the State Board of Insurance shall determine to be necessary after a hearing thereon, or except as provided in "consent to rate" statutes, any rates established under the provisions of the Insurance Code covering any risks or classes of risks which are located inland of the Intracoastal Canal on the Texas coastline (or inward of the boundary here authorized to be established by the State Board of Insurance amending such Intracoastal Canal boundary), may not be more than the maximum rates set by the Board under Subchapter C, Chapter 5, Texas Insurance Code, for similar risks or classes of risks under the same lines and kinds of insurance. The maximum rates applicable to risks and classes of risks located inland of the Intracoastal Canal on the Texas coastline shall apply also to similar risks and classes of risks located seaward of the Intracoastal Canal if the property is protected by a sea wall constructed by the Corps of Engineers, or if it is determined by the Board that the property or risk is protected by other adequate structure or by any natural physical feature of the terrain that provides protection, and the State Board of Insurance may adjust rates to take into account the degree of such protection.

If valid flood or rising water insurance coverage exists and is maintained on any risk being insured in the pool the State Board of Insurance may provide for a rate and reduction in rate of premium as may be appropriate.

The State Board of Insurance may make provision by rule and regulation requiring catastrophe reserves in respect of the premium received on risks or classes of risks located seaward of the boundary of the Intracoastal Canal and may require catastrophe reserves on risks or classes of risks located inland of the boundary of the Intracoastal Canal and as such boundary may be amended. The amount required to be

reserved for catastrophes (as such catastrophes are defined by the Board)shall be that portion of the pure premium as is actuarially made attributable, as ascertained by the Board, to prospective catastrophic loss. The portion of the pure premium attributable to prospective catastrophic loss shall not be income and shall be unearned until the occurrence of an applicable catastrophe as defined and shall be held in trust by the pool or trustee of the pool until losses are paid therefrom under such reasonable rules and regulations as the State Board of Insurance shall prescribe or approve.

Appeals

Sec. 9. Any person insured pursuant to this Act, or his duly authorized representative, or any affected insurer who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such act, ruling or decision, appeal to the Board. In the event the Association is aggrieved by the action of the Board with respect to any ruling, order, or determination of the Board, it may, within 30 days after such action, make a written request to the Board for a hearing thereon. The Board shall hear the Association, or the appeal from an act, ruling or decision of the Association, within 30 days after receipt of such request or appeal and shall give not less than 10 days' written notice of the time and place of hearing to the Association making such request or the person, or his duly authorized representative, appealing from the act, ruling or decision of the Association. Within 30 days after such hearing, the Board shall affirm, reverse or modify its previous action or the act, ruling or decision appealed to the Board. Pending such hearing and decision thereon, the Board may suspend or postpone the effective date of its previous rule or of the act, ruling or decision appealed to the Board. The Association, or the person aggrieved by any order or decision of the Board may thereafter appeal to the District Court of Travis County, Texas, and not elsewhere, in accordance with Article 1.04(f) of the Insurance Code of Texas.

Immunity From Liability

Sec. 10. There shall be no liability on the part of and no cause of action of any nature shall arise against the Board or any of its staff, the Association or its agents or employees, or against any participating insurer or its agents or employees, for any inspections made under the plan of operation or any statements made in good faith by them in any reports or communications concerning risks submitted to the Association, or at any administrative hearings conducted in connection therewith under the provisions of this Act.

Indemnification

Sec. 11. Each person serving as a director of the Association, each member of the Association, and each officer and employee of the Association shall be indemnified by the Association against all costs and expenses actually and necessarily incurred by him or it in connection with the defense of any action, suit, or proceeding in which he or it is made a party by reason of his or its being or having been a director or member of the Association, or an officer or employee of the Association except in relation to matters as to which he or it has been judged in such action, suit or proceeding to be liable by reason of misconduct in the performance of his or its duties as a director of the Association or a member or officer or employee of the Association, provided however, that this indemnification shall in no way indemnify a member of the Association from participating in the writings, expenses, profits, and losses of the Association in the manner set out in this Act. Indemnification hereunder shall not be exclusive of other rights to which such member or officer may be entitled as a matter of law.

Annual Report

Sec. 12. The Association shall file in the office of the Board annually a statement which shall summarize the transactions, conditions, operations and affairs of the

Association during the preceding year at such times and covering such periods as may be designated by the Board. Such statement shall contain such matters and information as are prescribed by the Board and shall be in such form as is required by it.

Effective Date

Sec. 13. This Act shall become effective from and after passage.

Conflicting Laws

Sec. 14. All laws or parts of laws in conflict herewith are hereby repealed to the extent necessary to accomplish the purposes of this Act.

Partial Invalidity

Sec. 15. If any provision of this Act or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 16. [Emergency provision].

Codification

Sec. 17. This Act is hereby codified as Article 21.49 of the Texas Insurance Code.

Application of Act

Sec. 18. This Act does not apply to farm mutual insurance companies, as defined in Article 16.01 of the Insurance Code, nor does it apply to any existing company chartered under old Chapter 12, Title 78, Revised Civil Statutes of Texas, 1925, repealed by Chapter 40, Acts of the 41st Legislature, 1st Called Session, 1929, Chapter 40.

APPENDIX 3

NO. 260,154

BEACON NATIONAL INSURANCE COMPANY and FIRST PREFERRED INSURANCE COMPANY	§	IN THE 53RD DISTRICT COURT
VS.	§	OF
TEXAS STATE BOARD OF INSURANCE and TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION	§	TRAVIS COUNTY, TEXAS

ORDER OF SEVERANCE

ON THIS 23rd day of August, 1978, came on to be heard the Motion of Severance heretofore filed herein by Defendants and it appearing to the Court that severance is necessary in order to expedite administration of this case:

IT IS THEREFORE ORDERED that Phase I of this suit concerning the administrative appeal of Plaintiffs Beacon National Insurance Company and First Preferred Insurance Company against Defendants Texas State Board of Insurance and Texas Catastrophe Property Insurance Association be severed from Phase II concerning the constitutional question and injunctive relief raised by Plaintiffs, and it is further ordered that the District Clerk shall make copies of all pleadings and file the same under a separate docket number so that Phase II may be administered henceforth as a separate lawsuit.

ENTERED this *19* day of *Sept.*, 1978.

/s/

HARLEY CLARK
Judge Presiding

APPENDIX 4

IN THE COURT OF CIVIL APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

* * *

NO. 13,096

BEACON NATIONAL INSURANCE
COMPANY, ET AL.,
APPELLANTS

vs.

TEXAS STATE BOARD OF
INSURANCE, ET AL.,
APPELLEES

* * *

FROM THE DISTRICT COURT OF
TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. 260,154-A, HONORABLE HARLEY CLARK,
JUDGE PRESIDING

* * *

After exhausting their administrative remedies, appellants, Beacon National Insurance Company and First Preferred Insurance Company, filed suit in district court against appellees, Texas State Board of Insurance and Texas Catastrophe Property Insurance Association, seeking to enjoin appellees from placing new or additional extra-hazardous risk policies with appellants, an entry of an order setting more equitable bases for voluntary writings and extra-hazardous risk insurance, and, alternatively, a declaration that Tex. Ins. Code Ann. art. 21.49 (Supp. 1979)(the "Catastrophe Property Insurance Pool Act"), was unconstitutional. Before trial, the district court severed the constitutional cause of action from the administrative appeal. The

administrative appeal proceeded to trial and was reviewed by this Court in Beacon National Insurance Company v. Texas State Board of Insurance, 582 S.W.2d 616 (Tex.Civ.App.--Austin 1979, no writ). After trial to the court on the issue of constitutionality, judgment was entered that Article 21.49 and the plan of operation of the Texas Catastrophe Property Insurance Association are constitutional and that all relief sought by appellants should be denied. Appellants have again perfected their appeal to this Court.

Appellants attack the constitutionality of Article 21.49 and the plan of operation of the Texas Catastrophe Property Insurance Association (known as the "Cat Pool") alleging that, by their operation, they abridge appellants' rights to due process and equal protection of law as guaranteed by the Constitutions of the United States and the State of Texas.

Appellants contend that Article 21.49 violates their right to equal protection of law by giving the larger insurance companies the competitive advantage of being able to write themselves out of Cat Pool participation and forcing the smaller companies, such as Beacon and First Preferred, to write the bulk of their policies in less desirable areas of the designated catastrophe zone. Many of the large companies have a very small percentage of participation in the Cat Pool as compared to that of the smaller companies. Appellants argue that this is due largely to the fact that the large insurers can obtain credit against Pool participation based on their voluntary writings in the catastrophe area and that, because of their size, they are able to pick and choose their risks. Furthermore, appellants assert that the smaller insurance companies are not able to write insurance voluntarily in the catastrophe area because of both a limitation in the number of agencies available to them and the refusal of lenders to accept policies from them.

Appellants also contend that Article 21.49 violates

their right to due process of law by forcing them to concentrate their coverage in certain limited areas so that, if a major catastrophe should hit one of those areas, appellants would possibly be subjected to such major losses as to amount to a taking of their property without compensation and which losses might impair their ability to meet their contractual obligations to their policyholders. Appellants point out that the Association has permitted concentration of more than 60% of the Pool in Galveston and Brazoria Counties. They predicate their suit on the issue of whether they would suffer unconstitutionally heavy financial losses should a major $800 million hurricane strike one of these counties where they have a concentration of windstorm coverage.

We have some question as to whether appellants have established a justiciable interest sufficient to maintain this suit for declaratory judgment. California Products, Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S.W.2d 780 (1960). A court will not declare rights on facts that are uncertain, contingent and which facts or events may never happen. Laborers' International Union of North America, Construction & Municipal Workers Local Union No. 1253 v. Blackwell, 482 S.W.2d 327 (Tex.Civ.App.--Amarillo 1972, no writ). Likewise, the mere fact that petitioners will sustain financial loss by reason of lawful competition is not sufficient to give them a justiciable interest. Alabama Power Company v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1937); West Texas Utilities Co. v. Smith, 168 S.W.2d 665 (Tex.Civ.App.--Austin 1943, writ ref'd).

However, assuming, *arguendo*, that appellants do have sufficient justiciable interest to allow them to maintain this suit, we feel that same must now be dismissed as moot.

Subsequent to entry of judgment upholding its constitutionality, Article 21.49 was amended by Acts 1979, 66th Leg., p. 1599, ch. 675, §l, eff. Aug. 27, 1979:

> "Sec. 19. In the event any occurrence or series of occurrences within the defined catastrophe area results in insured losses of the association totaling in excess of $100 million within a single calendar year, the proportion of the total loss allocable to each insurer shall be determined in the same manner as its participation in the association has been determined for the year under Subsection (c) of Section 5 of the Texas Catastrophe Insurance Pool Act, as amended, and any insurer which has paid its share of total losses exceeding $100 million in a calendar year shall be entitled to credit the amount of that excess share against its premium tax under Article 7064, Revised Civil Statutes of Texas, 1925, as amended. The tax credit authorized shall be allowed at a rate not to exceed 20 percent per year for five or more successive years following the year of payment of the claims. The balance of payments paid by the insurer and not claimed as such tax credit may be reflected in the books and records of the insurer as an admitted asset of the insurer for all purposes, including exhibition in annual statements pursuant to Article 6.12 of this Insurance Code."

Section 19 recognized the problem that a large catastrophe might visit on the smaller insurers and sought to deal with the problem by allowing losses in excess of $100 million to be credited against the insurer's premium tax. Clearly, this section was intended to alleviate the problem of which appellants complain in this suit.

In Clymore Co. v. Railroad Commission of Texas, 86 S.W.2d 797 (Tex.Civ.App.--Austin 1935, no writ), appeal was taken from an order of the trial court enjoining the Railroad Commission from producing gas from certain wells in Refugio County. The injunction was heard and determined under the authority of

Article 6008. Subsequent to entry of the order that was basis of appeal, Article 6008 was amended by adding Chapter 120. The Court held:

> "It is quite manifest that chapter 120 has... prescirbed definitions, standards, and criteria which in many respects are essentially different from those prescribed or involved in the 1933 amendment. Whether these differences call for a different holding in the instant appeal depends both upon a proper construction of chapter 120 and factual issues applying such construction to the wells in question. We cannot in this proceeding, upon the record made in a hearing involving only the 1933 amendment, determine the issues; but are confined to the issues presented by the record as applied to the 1933 amendment. That amendment having been superseded by chapter 120, and the temporary injunction being predicated upon the violation of the 1933 amendment, the case, as presented in this appeal, has become moot."

See also: Freeman v. Burrows, 141 Tex. 318, 171 S.W.2d 863 (1943); Danciger Oil & Refining Co. of Texas v. Railroad Commission of Texas, 122 Tex. 243, 56 S.W.2d 1075 (1933); Saunders v. Southwest General Insurance Company, 304 S.W.2d 406 (Tex.Civ.App.--Austin 1957, writ ref'd n.r.e.).

The addition of Section 19 to Article 21.49 materially qualifies the liability that each insurer must bear under the Act. One of appellants' major contentions is that, in the event of an $800 million hurricane, they would possibly be forced into receivership because their share of the loss would be so great. Should such a storm happen, Section 19 would come into play and would have a direct affect on appellants' liability under the Act; any losses over $100 million would be credited against their premium tax over a period of years.

We do not hold that Article 21.49 is or is not constitutional; likewise, we do not hold that, if it were unconstitutional, the addition of Section 19 would make it constitutional. These questions depend on a construction of Article 21.49 as it now exists along with all attendant factual issues. As the record in this proceeding deals only with pre-amendment Article 21.49, that construction and those factual issues are not properly before us. Clymore Co. v. Railroad Commission of Texas, *supra.*

As this suit determined the constitutionality of a statute that has, in the interim, been materially amended by the Legislature, and that amended statute is not properly before us, any judgment rendered by this Court on the merits would violate the constitutional prohibition against advisory opinions and would not be determinative of any existing controversy. Firemen's Insurance Company of Newark, New Jersey v. Burch, 442 S.W.2d 331 (Tex. 1968).

A case becomes moot when it appears that one seeks judgment upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy. McNeill v. Hubert, 119 Tex. 18, 23 S.W.2d 331 (1930).

This appeal being now moot, the judgment of the district court is reversed, and the cause is hereby dismissed. Freeman v. Burrows, *supra.*

Robert O. Smith,
Associate Justice

Reversed and Dismissed

Filed: April 23, 1980

Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1818

BEACON NATIONAL INSURANCE COMPANY and FIRST PREFERRED INSURANCE COMPANY,
Petitioners

v.

TEXAS STATE BOARD OF INSURANCE and TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,
Respondents

BRIEF OF TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

CLARK, THOMAS, WINTERS
& SHAPIRO
MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
(512) 472-8442
Attorneys for Respondent
Texas Catastrophe Property
Insurance Association

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

The parties in this cause are:

Beacon Insurance Company, and
First Preferred Insurance Company, Petitioners

v.

Texas State Board of Insurance, and
Texas Catastrophe Property Insurance
Association, Respondents

INDEX OF CONTENTS

	Page
THIS INDEX	II
INDEX OF AUTHORITIES	III
CAPTION	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
PROVISIONS INVOLVED	3
REASONS FOR DENIAL OF WRIT	3
1. There is no federal question involved.	3
2. The judgment below rested on adequate and independent state grounds.	4
3. The concept of due process urged by Petitioners has been rejected by this Court.	4
4. The decisions below are in accord with this Court's express holdings on the right to trial by jury.	6
CONCLUSION	7
PRAYER	8
SIGNATURE OF COUNSEL	8
PROOF OF SERVICE	9
APPENDIX A	11
APPENDIX B	12
APPENDIX C	14
APPENDIX D	16

INDEX OF AUTHORITIES

	Page
Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442 (1977)	6, 7
Ferguson v. Skrupa, 372 U.S. 728 (1963)	4, 5
Michigan v. Tyler, 436 U.S. 490 (1978)	4
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	6
Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977)	4
28 U.S.C. § 1257	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1818

BEACON NATIONAL INSURANCE COMPANY and FIRST PREFERRED INSURANCE COMPANY,
Petitioners

v.

TEXAS STATE BOARD OF INSURANCE and TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION,
Respondents

BRIEF OF TEXAS CATASTROPHE PROPERTY INSURANCE ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

The petition for certiorari should be denied because no federal question of substance was decided below.

OPINIONS BELOW

The only mention of any federal question in either opinion below is the introductory paragraph in the trial court order reading (Petition, Appendix 7, p. 37):

> "By pretrial order previously entered in this cause, the Court held that Plaintiffs' petition stated two separate and divisible causes of action, one being an administrative appeal under Article 21.49 of the Texas Insurance Code, Article 1.04f of the Texas Insurance Code, and Article 6252-13a, V.A.T.S., and the other a suit to determine questions as to the constitutionality of the statute. The Court has also previously held that the administrative appeal portion of the suit is controlled by the Texas Register and Administrative Procedure Act, Article 6252-13a V.A.T.S. and subject to review under the Substantial Evidence Rule. The Court then severed the administrative appeal and the administrative appeal was submitted to the Court upon the basis of the record before the State Board of Insurance and the briefs of the parties; and the Court having considered all material pertinent to that portion of the case and finding that the Order entered herein by the State Board of Insurance was not arbitrary, capricious or unreasonable but is instead reasonably supported by substantial evidence;"

Actually there were two pretrial orders. A copy of the first is attached hereto as Appendix A; the second is included as Appendix B. In conformity with the second order, the courts below limited their holdings to Texas law and Texas procedure.

JURISDICTION

The final state court judgment was not based upon any treaty or statute of the United States and does not rule upon the validity of any state statute; Petitioners concede that "the decision below was not based on federal grounds" (Petition, p. 8); the requirements of 28 U.S.C. § 1257(3) have not been fulfilled.

QUESTIONS PRESENTED

The questions asserted by Petitioners are not properly based on the judgments below. As the trial court made abundantly clear in the portion of the opinion quoted hereinabove, the administrative appeal was severed from the portion of the originally asserted cause of action wherein Petitioners alleged violation of constitutional rights and guarantees. The administrative appeal was separately tried and, after trial, severed for separate appeal. The order of severance was prompted by Petitioners' motion which is attached hereto as Appendix C, and the order itself is attached hereto as Appendix D. The judgment and rulings below (Petition Appendix 1, 2 and 7) relate solely to the administrative appeal. The constitutional allegations in Petitioners' pleadings were later separately tried, but the holdings thereon are not before this Court.

PROVISIONS INVOLVED

Both courts below based their decisions in part on Insurance Code Article 21.49, Vernon's Annotated Texas Statutes, but neither ruled upon its validity in relation to any provision in the Constitution of the United States.

REASONS FOR DENIAL OF WRIT

1. *There is no federal question involved.* The First Amended Original Petition filed by Petitioners as plaintiffs in the District Court of Travis County, Texas (Petition Appendix 6, p. 30), first asserts an administrative appeal under Article 6252-13a, Vernon's Annotated Texas Statutes (p. 31), and only alternatively alleges violation of the Fourteenth Amendment to the United

States Constitution (p. 34). The constitutional issues were severed for separate trial (Appendix D hereto), and no holding thereon is in either decision below. The Fifth and Seventh Amendments to the United States Constitution were not even mentioned in Petitioners' trial court pleading.

Petitioners joined in the motion to sever (Appendix C hereto) and, therefore, consented for this cause to be tried on state grounds. In *Michigan v. Tyler,* 436 U.S. 490 (1978), this Court pointed out that (ftn. 7):

> "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."

2. *The judgment below rested on adequate and independent state grounds.* The applicable rule here is that which this Court stated in *Zacchini v. Scripps-Howard Broadcasting Company,* 433 U.S. 562 (1977), when it wrote (433 U.S. 566):

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, Wilson v. Loew's Inc., 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

3. *The concept of due process urged by Petitioners has been rejected by this Court.* In *Ferguson v. Skrupa,*

372 U.S. 728 (1963), this Court explained that (372 U.S. 729-730):

> "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . The doctrine . . .—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitutue their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' "

A later holding to the same effect in that opinion reads (372 U.S. 731-732):

> "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer,

> Lord Keynes, or some other is no concern of ours. The Kansas . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas."

Portions of those excerpts were quoted in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), where it was further held that (414 U.S. 167):

> "Those two opposed views of public policy are considerations for the legislative choice. The Liggett case was a creation at war with the earlier constitutional view of legislative power. Munn v. Illinois, 94 U.S. 113, 132, 134, 24 L.Ed. 77, and opposed to our more recent decisions. Olsen v. Nebraska ex rel. Western Ref. & Bond Ass'n, 313 U.S. 236, 241, 61 S.Ct. 862, 85 L.Ed. 1305; Williamson v. Lee Optical Co., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563; Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 72 S.Ct. 405, 96 L.Ed. 469, as well as the Daniel, Lincoln Union, and Ferguson cases already discussed. The Liggett case, being a derelict in the stream of the law, is hereby overruled."

4. *The decisions below are in accord with this Court's express holdings on the right to trial by jury.* The Texas courts have held that the administrative appeal here should be and properly was tried under the substantial evidence rule and that no jury was authorized. Petitioners urge that the Fourteenth Amendment should be expanded to include the right to trial by jury on their appeal of the administrative decision. A comparable contention was advanced in *Atlas Roofing Co. v. Occupational Safety &*

Health Review Commission, 430 U.S. 442 (1977), where it was noted that (430 U.S. 450):

> "Petitioners then claim that to permit Congress to assign the function of adjudicating the Government's rights to civil penalties for violation of the statute to a different forum—an administrative agency in which no jury is available—would be to permit Congress to deprive a defendant of his Seventh Amendment jury right. We disagree. At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."

A later holding clearly in point and clearly contrary to Petitioners' contention reads (430 U.S. 460):

> "The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes."

CONCLUSION

Petitioners have not fulfilled the general requirements for this Court's jurisdiction and have presented no issue meritorious of this Court's ruling.

PRAYER

WHEREFORE, PREMISES CONSIDERED, this Respondent Texas Catastrophe Property Insurance Association prays that writ of certiorari be denied.

Respectfully submitted,

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
(512) 472-8442

Attorney for Respondent
Texas Catastrophe Property
Insurance Association

Of Counsel:

CLARK, THOMAS, WINTERS & SHAPIRO
P. O. Box 1148
Austin, Texas 78767

PROOF OF SERVICE

I, Mary Joe Carroll, Attorney for Texas Catastrophe Property Insurance Association, a Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of June, 1980, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on the parties hereto, said copies having been mailed to Mr. Joe E. Shaddock, 318 City National Building, Wichita Falls, Texas 76301, Attorney for Petitioners, and to Ms. Catherine Brown Fryer, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Co-Respondent Texas State Board of Insurance.

MARY JOE CARROLL

APPENDIX A

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE COMPANY
AND FIRST PREFERRED INSURANCE COMPANY

v.

TEXAS STATE BOARD OF INSURANCE AND
TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION

ORDER

Came on to be heard on the 18th day of August, 1977, the motion of the Texas Catastrophe Property Insurance Association for a determination of scope of review and Plaintiff's motion for production of documents. After argument of counsel, the Court enters the following order:

It is ordered, adjudged, and decreed that the scope of review of the order of the State Board of Insurance shall be substantial evidence and not trial de novo; it is further ordered, adjudged, and decreed that Texas Catastrophe Property Insurance Association's motion for protective order be and is hereby granted.

Signed and ordered this 1st day of September, 1977.

/s/ Charles D. Mathews
Charles D. Mathews

APPENDIX B

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE
COMPANY, ET AL

v.

STATE BOARD OF INSURANCE, ET AL

PRE TRIAL ORDER

On this 3rd day of March, 1978 came on to be heard the Motion of Defendant Texas Catastrophe Property Insurance Association to strike the above case from its jury setting and all parties having appeared by their respective attorneys and announced ready the court proceeded to hear such motion and to determine the manner in which this case is to be tried:

It appearing to the court that there are separate and divisible causes of action alleged in the Petition of Plaintiffs and that the portion dealing with the administrative appeal should be tried first and separately from the other causes of action, it is therefore ordered:

1.) The administrative appeal will be determined first and separately from the remainder of the case.

2.) The administrative appeal will be determined by the Court by a review of the record before the State Board of Insurance under the Substantial Evidence Rule and no additional evidence will

be accepted in this phase of the case. Plaintiffs will submit written briefs and defendants will have 21 days after receipt of Plaintiff's brief to file their reply briefs. The Court will then determine this phase of the case and advise all parties of his proposed ruling.

3.) All instruments concerning the administrative appeal portion of the case will be so denominated and all exhibits for this phase of the case will be referred to as I - 1., I - 2, etc.

4.) Upon the determination of the administrative appeal phase of the case the court will then proceed, if necessary, to hear the constitutional law question and injunction without the intervention of a jury. Additional evidence will be accepted for this phase of the case only.

5.) All instruments concerning the constitutional law and injunction phase of this case will be so denominated and all exhibits for this phase of the case will be referred to as II - 1., II - 2, etc.

/s/ HARLEY CLARK
Judge Presiding

APPENDIX C

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE COMPANY
AND FIRST PREFERRED INSURANCE COMPANY

v.

TEXAS STATE BOARD OF INSURANCE AND
TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION

MOTION FOR SEVERANCE

NOW COMES Beacon National Insurance Company and First Preferred Insurance Company, Plaintiffs herein and present to the Court this their Motion for Severance of their appeal from the Texas Catastrophe Pool Insurance Association and State Board of Insurance orders from their cause of action alleging the unconstitutionality of the operation of the Texas Catastrophe Property Insurance Association and for injunction and for grounds would show to the Court that these questions involve separate questions of law, that the Appeal (Phase I) has been ruled to be tried on the Substantial Evidence Rule while the remainder of the causes of action (Phase II) will be tried on new evidence in a non-jury trial. Further Defendants have moved for severance and Plaintiffs now join Defendants in their Motions for Severance in the manner indicated above.

WHEREFORE, premises considered, Plaintiffs pray for Severance as above.

Respectfully submitted,

Joe E. Shaddock
318 City National Building
Wichita Falls, Texas 76307

APPENDIX D

NO. 260,154

IN THE 53RD DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

BEACON NATIONAL INSURANCE COMPANY
AND FIRST PREFERRED INSURANCE COMPANY

v.

TEXAS STATE BOARD OF INSURANCE AND
TEXAS CATASTROPHE PROPERTY
INSURANCE ASSOCIATION

ORDER OF SEVERANCE

ON THIS 23rd day of August, 1978, came on to be heard the Motion of Severance hertofore filed herein by Defendants and it appearing to the Court that severance is necessary in order to expedite administration of this case:

IT IS THEREFORE ORDERED that Phase I of this suit concerning the administrative appeal of Plaintiffs Beacon National Insurance Company and First Preferred Insurance Company against Defendants Texas State Board of Insurance and Texas Catastrophe Property Property Insurance Association be severed from Phase II concerning the constitutional question and injunctive relief raised by Plaintiffs, and it is further ordered that the District Clerk shall make copies of all pleadings and file the same under a separate docket number so that Phase II may be administered henceforth as a separate lawsuit.

ENTERED this 19th day of Sept., 1978.

/s/ HARLEY CLARK
Judge Presiding